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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 183

HENRY W. GRUNEWALD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 184

MAX HALPERIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 186

DANIEL A. BOLICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Vol. V, App. 288–357, 380–393) are reported at 233 F. 2d 556.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1956 (Vol. V, App. 358) and petitions for rehearing were denied on June 1, 1956 (Vol. V, App. 394). The petitions for writs of certiorari were filed on June 21, 1956, and were granted on October 15, 1956 (R. 984). 352 U. S. 866. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The questions, as limited in the order granting the writs of certiorari (R. 984–988) (352 U. S. 866),[1] are:

(a) No. 183

1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the

[1] The phraseology of these questions is taken directly from the petitions for writs of certiorari. They contain assumptions which we believe to be contrary to fact and which tend to make answers in favor of petitioners inevitable. We try to set these matters straight in the course of the Argument, *infra*, pp. 45–46, 85, 97–98.

knowledge or the participation of the petitioner Grunewald, may suffice to support a charge against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be presumed to know that their activities would always be open to investigation—whether a subordinate conspiracy to conceal may be implied from the original crime.

5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-

incrimination on a long line of questions. The constitutional privilege thus infringed is that part of the Fifth Amendment which reads "* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

No. 184

1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defendant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he could not cross-examine or be represented by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness in his own behalf?

4. Does the rationale of *Raffel* v. *United States*, 271 U. S. 494, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

5. Does not the doctrine and rationale of *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956, compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, "An innocent man may honestly claim his answers may tend to incriminate him"?

8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604?

9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's de-

cision in *Kotteakos* v. *United States*, 328 U. S. 750?.

No. 186

1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility.

(b) No. 184

7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitutional privilege might also serve to protect the person giving the advice?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitution of the United States, Amendment V, provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U. S. C. 3481 provides:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each one shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U. S. C. 1503 provides in pertinent part:

> Whoever corruptly, * * * endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other commit-

ting magistrate, or any grand or petit juror, or officer in or of any court of the United States, * * * in the discharge of his duty, * * * or corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

After a trial in the United States District Court for the Southern District of New York, all three petitioners were convicted on count 1 of an indictment, returned October 25, 1954, charging a conspiracy among themselves and with others "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption, and in its right and interest in the conscientious, honest and faithful services, judgments, determinations, and actions of the defendants" who were employees of the Bureau of Internal Revenue, and to conceal the acts of the con-

spirators (R. 4–9).[2] Each was sentenced to five years' imprisonment and fined on this count (R. 2–4; 782–783). Petitioner Halperin alone was convicted on counts 5, 6 and 7, which charged a corrupt endeavor to influence particular witnesses (Marks, Berman, and Tobias) before the grand jury in the Eastern District of New York to give false testimony and to withhold information concerning certain of the transactions involved in count 1, in violation of 18 U. S. C. 1503 and 1505 (R. 14–16).[3] He was sentenced to two years' imprisonment and $1,000 fine on each of these three counts, the prison sentences to run concurrently with the sentence on count 1 (R. 3–4). These judgments were affirmed on appeal (Vol. V, App. 358), Judge Frank dissenting (Vol. V, App. 316–357, 381–393).[4]

[2] With respect to the conspiracy to conceal, paragraph 7 of the indictment alleged (R. 6):

"It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative and judicial, of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, bribery, improper influence and corruption of government employees, the giving of false testimony, the influencing, intimidating and impeding of prospective witnesses to refrain from disclosing the true facts, obstruction of justice, and the presentation of false and fraudulent affidavits, statements and documents to the aforesaid Bureau."

See also paragraphs 13 and 14, *infra*, p. 52 (R. 7).

[3] These counts were dismissed as to the other petitioners at the close of the government's case (R. 569).

[4] Petitioner Bolich was also convicted on count 2 which charged him, along with Steinberg and Scherm, as employees of the Bureau of Internal Revenue, with conspiracy in violation of 26 U. S. C. 4047 (e) (4) (R. 9–12). He was sentenced to three years' imprisonment and a $5,000 fine on that count, the prison sentence to run concurrently with the five-year sentence on count 1 (R. 782–783). The Court of Appeals, holding that both counts related to the same conspiracy, set aside the separate fine on count 2 (Vol. V, App. 358).

In granting certiorari the Court specifically limited the issues which it agreed to consider. In view of these limitations we have restricted our statement of the facts to matters which are pertinent to the questions before the Court, together with such background material as is essential to give those facts meaning.

1. The evidence for the government may be summarized in general chronological order as follows:

In 1947, the Bureau of Internal Revenue was investigating the income tax returns of two New York firms, Pattullo Modes, Inc., a dress manufacturing concern, and the Gotham Beef Company, a meat supplier to ship chandlers (R. 286, 570, 574–576, 896–898). By May 8, 1947, the investigation of the Pattullo Modes income tax returns for the years 1942, 1943, 1944, 1945, and 1946, revealed that the corporation had failed to report over $300,000 of income on its returns (R. 576). This income was derived from off-the-record sales and "jacking up the travel and entertainment accounts" and putting the cash proceeds in a safe deposit box (R. 18–20, 21). On May 8, 1947, the revenue agent investigating the Pattullo case recommended that it be referred to the Intelligence Unit of the Bureau for criminal fraud investigation (R. 576). (The special agent in the Intelligence Unit (Clayton) who received the case from the revenue agent in early February, 1948 (R. 419), concluded by January 5, 1949, after some investigation, that "the case was well in line to go forward to prosecution" (R. 431).)

By April of 1948, the investigation of the Gotham Beef Company and Gotham Ship Purveyors, Inc., for the years 1943 and 1944 (R. 853) revealed that $280,-

000 in sales had not been reported on their returns (R. 897).[5] The Gotham Beef people claimed that this figure represented over-ceiling sales which were offset by over-ceiling purchases (R. 155). The investigation substantiated only $160,000 of unreported purchases by Gotham (R. 898). The documentary proof submitted by the taxpayer of cash premium payments was only 10 to 20 per cent of the amount claimed (R. 312, 853). In his final report in April, 1948, the special agent investigating the Gotham case recommended criminal prosecution of the corporation and the partners, Louis and Philip Berman (R. 286, 854, 898).

Through intermediaries, both the Pattullo Modes stockholders and the Gotham Beef people had been referred to the law firm of Schopick and Davis for assistance in their tax matters. The tax troubles of Pattullo Modes were mentioned by Max Steinberg, a group chief in the revenue agent's office, to Milton Hoffman,[6] during a golf game in May 1947 (R. 207). Hoffman, learning that neither Schopick nor Davis had a contact with Pattullo Modes, arranged through his brother-in-law, Herman Deutsch, to meet Smith,

[5] Louis M. Berman and his brother Philip operated the Gotham Beef Company as a partnership in 1942. In 1943, they incorporated their business under the name of Gotham Ship Purveyors, Inc. In 1944 the corporation ceased operating (R. 134).

[6] Milton Hoffman, who was neither a lawyer nor a certified public accountant (R. 200), went to work for the law firm of Sherman, Schopick and Davis in 1945 and was to receive 12½ per cent of OPA fees. In 1948 or 1949, after Sherman left, Hoffman and Davis agreed that each would receive 47½ per cent of Schopick and Davis law firm receipts and Schopick would get the remaining 5½ per cent (R. 257-258).

the accountant for Pattullo Modes, who came to the law office of Schopick and Davis (R. 22, 207). For this Deutsch was paid $500 (R. 96–97, 826–827). Hoffman assured Smith he could be of help to Pattullo Modes in their tax troubles (R. 208) and arranged a meeting between Smith and Steinberg which was held about June 5, 1947 (R. 209). Steinberg promised to do everything he could to help (R. 209). The following Monday, about June 9, 1947, Mrs. Segel and Marks, Pattullo Modes' officers and stockholders, came to the office of Schopick and Davis and gave them a check for $7,500 as a retainer (R. 23–24, 210, 784). After an audit of Pattullo Modes' books in September, 1947, Schopick and Davis retained the law firm of Schwaeber and Saver in October, 1947, to represent Pattullo Modes (R. 305–306). The Pattullo Modes case was transferred to the intelligence unit, then under the supervision of petitioner Bolich, a high official in the Bureau of Internal Revenue (R. 306), in February 1948 (R. 419).

In October, 1947, Davis and Hoffman discussed with Schwaeber and Saver the voluntary disclosure policy of the Treasury Department (R. 306–307). Following the discussion, Davis told Smith, the accountant for Pattullo Modes, that "if he could say that he told the revenue agent of any additional income, no matter how meager the information was, that would be a voluntary disclosure according to Schwaeber's ideas" (R. 307). Smith, realizing that such a statement would pit his word against the revenue agent's (Scherm) word, said he was prepared to do so (R. 307). Though Davis did not

believe that Smith had made a disclosure to Agent Scherm, he told Saver that this had been done. Saver arranged a meeting for Smith with Wheeler, the revenue agent in charge and supervisor of Scherm (R. 308). Wheeler refused to believe a voluntary disclosure had been made by Smith (R. 308) and wrote a letter, dated February 3, 1948, to Bolich, the official in charge of the intelligence unit, requesting assignment of a special agent to the Pattullo Modes case (R. 581). Agent Clayton was given the assignment (R. 582). See *supra*, p. 10.

In March 1948, when the Pattullo Modes case was in the office of the intelligence unit, Saver discussed voluntary disclosure with Bolich (R. 308). Bolich did not then believe that a voluntary disclosure had been made (R. 308–309). On learning of Bolich's disbelief, Davis discussed the case with petitioner Halperin, a lawyer who had space in the office of Davis and Schopick (R. 605–606), and "said to him that this was a case where we needed some real help" (R. 309). Halperin said, "he knew a man in Washington," whom he identified as petitioner Grunewald, "a man he had known for a great many years, who was extremely influential and knew a great many people in Washington, and that if anybody could help, he would be the man to help" (R. 309). When asked why he did not go to Washington to see Grunewald, Halperin said he was not sure that he was on the best of terms with Grunewald (R. 309). Halperin said that if Davis wanted to meet Grunewald, Moe Polakoff, a personal friend of Grunewald, would arrange a meeting (R. 309). When Davis told Polakoff of the Pat-

tullo Modes tax troubles, Polakoff said "he thought that there was a man in Washington that could help" and identified him as Grunewald (R. 309–310). In May 1948, Davis and Hoffman (Davis' business solicitor, see *supra*, p. 11, fn. 6) accompanied Polakoff to Washington where Polakoff left them for a while and they then saw Polakoff and Grunewald conversing together in the Washington Hotel (R. 310). On the return trip to New York City, Polakoff reported that Grunewald had said he would look into the Pattullo Modes matter and report (R. 310). Davis had no further contact with Polakoff concerning the case (R. 310–311).

At this stage in the Pattullo Modes matter, the Gotham Beef tax case came to Schopick and Davis through Leo Greenstein, an accountant who had audited the Pattullo Modes books (R. 311, 855). Berman, a partner in Gotham Beef (R. 134), retained Schopick and Davis to handle the tax case (R. 153).

Davis met Berman and Tobias (an accountant) in late May or early June of 1948 (R. 311) and learned the facts of the Gotham Beef tax case (R. 312). Davis reported to Hoffman, Schopick, and Halperin (R. 312) that they could "get into" the case if they were in a position to help (R. 313). While Davis was away on vacation in late June, 1948, he received a phone call from Hoffman and Halperin who said they had been to Washington and had met Grunewald who had agreed to look into the Gotham Beef case (R. 219, 313). Before meeting Tobias in July, 1948, Davis learned that Halperin, on his trip to Washington, had been "extremely well received by Mr. Grune-

wald and that Mr. Grunewald said he was surprised that Mr. Halperin had felt that he couldn't come to see him, and that by all means he would work with him and was glad to work with him" (R. 313–314). Halperin reported that Grunewald in Washington had telephoned someone and had said "This is Captain Henry; put a red flag, red stop, on the Gotham Beef case" (R. 892).

In early August, 1948, Davis and Halperin next met Berman and Tobias at lunch (R. 139). Davis explained that Halperin, an attorney who shared space in his office, had been brought into the case "because he had a very influential and wealthy associate in Washington" who "had connections with the Internal Revenue Department, and that he could handle this matter in a manner that would be satisfactory to us" (R. 139–140). Halperin assured the Gotham Beef people that "if this party took this case there would be nothing more happen on it; it would be ended" (R. 140). Davis or Halperin then asked for a "fee" of $100,000. Berman offered to pay only $25,000 (R. 140, 858–859). Halperin said that "this influential associate of his in Washington" who "could walk into a Senator's office, many, many Senators' offices without being announced" was not going "to use up one of his favors unless he was paid a good-sized fee" (R. 140). They refused to disclose the identity of the "Washington associate" to Berman (R. 859).

In late July, 1948 (R. 317), after Davis had been in the Gotham Beef case a short time, and while the "fee" negotiations were in progress (R. 141), Davis, at Halperin's suggestion, tried to contact Bolich rela-

five to the case (R. 316). Davis was twice in one day put off by Bolich's secretary (R. 316). Upon learning this, Halperin called Grunewald who said that Davis was to continue to call Bolich and that Bolich would speak to him (R. 316). When Davis again telephoned Bolich's office, he was put through by the latter's secretary and arranged an appointment for the next day (R. 317). At the meeting in Bolich's office the next day, Davis described the Gotham Beef case and was told by Bolich to submit the proof of off-setting over-ceiling cash purchases and net worth statements of the taxpayers (R. 317) to Kuehl, of the Review and Conference Staff of the Intelligence Division (R. 141, 275), who was then reviewing Special Agent Mullenbach's recommendation of criminal prosecution (R. 286).

On the day of his meeting with Davis, Bolich telephoned Kuehl, a subordinate with whom he had not communicated in three years, and informed him of Davis' visit and his contentions (R. 276–277, 896). Kuehl pointed out to Bolich that the files showed that Ronayne, not Davis, was attorney of record for the Gotham Beef Company (R. 277). Bolich said Davis would submit a power of attorney (R. 277). Davis filed a power of attorney about August 4, 1948 (R. 278–279).

At a conference held August 16, 1948, attended by Davis, Tobias, and Berman, for Gotham Beef, and Mullenbach and Kuehl, for the Bureau (R. 280), the Gotham Beef people submitted some substantiating records to support their claims (R. 281). Mullenbach

was instructed to work with Tobias and Davis and to prepare a supplemental report (R. 281).

Following this conference with Kuehl, Tobias and Berman again met with Davis and Halperin to discuss "fees" (R. 142). Davis then said he was able to get the "fee" cut to $75,000 and Berman then offered $40,000 (R. 141, 861). At this time, Davis mentioned that Halperin, through his Washington "associate," was able to reach Bolich when he himself could not (R. 141, 860). At the next meeting between Davis, Halperin, Tobias and Berman, Davis said he was able to get the "fee" cut to $65,000 because "they had another case pending which was greater in proportion and greater in amount than ours and they wanted to use our case as a guinea pig to see whether their associate in Washington could handle the matter satisfactorily" (R. 142, 862). Though Berman then offered to pay only $55,000, he later telephoned Davis and agreed to pay over $65,000 (R. 143), contingent on stopping the prosecution (R. 860).

Under the agreement as it was worked out, $60,000 in cash was to be placed in a safe deposit box in escrow to Halperin and Greenstein (the accountant), acting for the taxpayers, to be released at "such time as Mr. Tobias had gotten word from the proper authorities that the case had been—that the prosecution end of the case had been over with, * * *" (R. 144, 863). $5,000 was to be handed over to Schopick and Davis when "billed" (R. 143, 863–864). Berman brought $47,500 on September 15, 1948, and $12,500 ten days later to Davis (R. 145–147). The money was placed in a safe deposit box in the Trade Bank, for which

Halperin paid the $20 fee (R. 185), on September 15, 1948 (R. 147).

Halperin, though asked many times by Greenstein, refused to identify Grunewald as the Washington "associate" for whom he was acting (R. 882). Tobias learned directly from Kuehl that there would be no criminal prosecution (R. 167, 282). After telling Berman that a no-prosecution result had been achieved, Tobias authorized Greenstein to release the $60,000 he held in escrow to Halperin (R. 169, 867). A day or so later, Greenstein reported to Tobias that the money had been given to Halperin (R. 169). On October 29, 1948, Schopick and Davis "billed" Berman for $5,000 (R. 148). Davis gave Halperin $1,760, approximately one-third of the $5,000 received from Gotham Beef, for his activity in connection with the case (R. 905). Greenstein later received $370 from Schopick and Davis for his services in the case (R. 881).

Contemporaneously with their efforts in behalf of the Gotham Beef Company during 1948, Davis, Hoffman and Halperin were working on the Pattullo Modes case. In June 1948, Davis told Marks and Mrs. Segel of Pattullo Modes that he was dissatisfied with the progress Schwaeber and Saver were making (R. 26–27); that "he had a man in his office that could be of great help"—a Mr. Halperin. He said that Halperin (who had gone to Washington around this time with Hoffman to see Grunewald (R. 313)), had "a very good friend in Washington, an influential friend that he [Davis] would like him [Halperin] to talk to about our case" (R. 27). Davis did not

identify Halperin's Washington "friend" to Marks and Mrs. Segel (R. 27).

In early July 1948, Hoffman and Halperin again went to Washington to meet Grunewald to learn if he would handle the Pattullo Modes case (R. 219–220). While Hoffman waited in the living room of Grunewald's suite in the Washington Hotel, Halperin talked to Grunewald alone (R. 219–220). During the return trip to New York City, Halperin reported to Hoffman that "Mr. Grunewald said he would look into the Pattullo Modes case and see if he could be of any help" (R. 220). This was the second time Grunewald had agreed to do something about the case. *Supra*, p. 14. Upon Halperin's return from Washington, he went with Davis to meet Mrs. Segel and Marks and reported that he "spoke to his friend and that his friend thought he could help us and would start working on it" (R. 27–28). Davis gave Halperin $200 to cover his expenses on the Washington trip (R. 891, 904).

At about this same time, July 1948, Special Agent Clayton who had been assigned the Pattullo Modes case (*supra* pp. 10, 13) began a full field investigation (R. 420). As part of this investigation, Clayton proposed to circularize the customers of Pattullo Modes to ascertain the extent of business that they had transacted with Pattullo Modes (R. 420–421). Davis reported the possibility of circularization to Marks and Mrs. Segel who, saying they feared damage to their credit, asked Davis "to do everything he could to stop it" (R. 29, 315). Davis talked to Halperin who re-

marked that, "he wasn't sure he could do anything, but he would mention it to Mr. Grunewald" (R. 315–316). In early August 1948, Clayton went to Loehmann's store, a customer of Pattullo Modes, to review the records to learn what payments had been made to Pattullo Modes (R. 421–422). On the day of the visit, his group chief in the Bureau, Dowling, received a telephone call from Bolich who said, "Tell Special Agent Clayton to stay away from the banks and not visit any third parties in connection with his investigation" since it might jeopardize the credit of Pattullo Modes (R. 488, 932). A few days later, Clayton, at the request of Bolich, was asked for a status report showing the results of the investigation to date (R. 422, 488). The status report was dated August 6, 1948 (R. 489, 933). No circularization of Pattullo Modes' customers ever took place (R. 316). Davis told Marks (of Pattullo Modes) "that because of his good influence with the proper people he was able to get them not to circularize our [Pattullo Modes] accounts" (R. 29).

After the threat of circularization of Pattullo Modes accounts had been quieted, a series of conversations took place among the Pattullo Modes people and Davis, Halperin and Hoffman (R. 29). It was not until September 1948 that Davis reported to Mrs. Segel and Marks. "that Mr. Halperin's friend in Washington would be able to achieve the results that we wanted to settle our case satisfactorily for us, but it would cost us a great deal of money in cash" (R. 29). Davis mentioned $150,000 as the required amount and Marks offered to pay $50,000 (R. 29–30). Davis re-

jected the offer as "very, very silly" and said he would see what he could get Halperin and his "friend" to do (R. 30). Two weeks later, after Halperin had returned from Washington, Davis asked for $125,000 and Marks offered $70,000 (R. 30).

When Grunewald's demand stood at $125,000, Davis, Hoffman and Halperin went to Washington in late September or early October, 1948. Halperin alone went to Grunewald's office in the Munsey Building and later called Davis to join him. Before introducing Davis to Grunewald, Halperin told Davis that Grunewald had agreed to accept $100,000. After the introduction was made, Halperin repeated Grunewald's acceptance of the "case" for $100,000. When Davis thanked him, Grunewald said "O. K., O. K." (R. 327–328).

On his return from Washington, Davis told Marks and Mrs. Segel that they would accept $100,000, and that that was "their final word" (R. 30). When asked who was going to get the $100,000, Davis said that "the man in Washington would do it for $100,000" *i. e.*, "would settle our case satisfactorily to us" (R. 30–31, 828–830). The result the Pattullo Modes people were seeking for their $100,000 was "to settle this matter in a civil way without criminal prosecution" (R. 31). Davis told them that "nothing would be turned over until it was clear that there would be no prosecution" (R. 902). He also told them that the money must be in cash and he said further, "I don't want you to sell any securities. I don't want you to draw any money out of the bank in cash. There can be no record of this money" (R. 31, 902). The Pattullo Modes people

raised the money in cash, took it to Davis' office in late October, 1948 (R. 33, 831), gave it to Davis and Hoffman, and left (R. 31–32, 831, 902). Davis at that time said that the money would be turned over to Halperin to keep in New York until word was received from his "friend" in Washington that the desired result had been attained (R. 32, 920–921). The Pattullo Modes people, as of this time, did not yet know the identity of the Washington "friend" of Halperin (R. 32). Schopick and Davis never filed a power of attorney from Pattullo Modes (R. 914).

During October, 1948, the law firm of Schwaeber and Saver continued to press the Pattullo Modes case, unaware of the interest of Halperin and Grunewald in it. When Davis asked Halperin if the firm of Schwaeber and Saver should be continued in the case, Halperin replied that he had discussed the matter with Grunewald and that Grunewald "thought it would be better to leave them in the case so if by any chance a good result was achieved here that Schwaeber and Saver should not feel slighted and wonder why they couldn't get the same result" (R. 318). Schwaeber and Saver pursued the voluntary disclosure line of defense (R. 328). See *supra*, p. 13. When Baradel, Chief of the Conference Section of the Special Agents' Office, requested an affidavit from the accountant for Pattullo Modes, setting forth the facts of the alleged voluntary disclosure, Davis assisted Smith (the accountant) in the preparation of a false affidavit which Saver was to present to Baradel (R. 328). After hearing both Smith and revenue agent Scherm, Baradel ruled that there had been no voluntary disclosure

made in behalf of Pattullo Modes (R. 465, 472–473, 477, 940–941). Baradel testified that "* * * [Smith] had the worst memory I had ever come across in my long experience or that he was lying" (R. 473).

Though Special Agent Clayton had been informed by Bolich that the Pattullo Modes taxpayers had agreed to cooperate and make available the required records in August, 1948, at the time Bolich had instructed him to curtail his investigation (R. 423, 939), he was unable to secure this cooperation (R. 424, 426). On about November 19, 1948, Clayton, not knowing that any promise had been made to Pattullo Modes by any government official that they would not be prosecuted if they cooperated, went to Pattullo Modes office to begin his examination of the corporate and personal records (R. 426).

During the period that Clayton was trying to secure the cooperation of Pattullo Modes, Bolich had been promoted from his position as Special Agent in Charge of the Intelligence Division Office in New York and had gone to Washington, on about September 1, 1948, as Assistant Commissioner of Internal Revenue (R. 425, 498). It was during this period that Davis discussed Clayton's insistence on beginning the audit of Pattullo Modes' books with Halperin and pointed out that, since such an audit would amount "to a complete revelation of all of the taxpayers' tax evasions," they ought to know where they were going (R. 329). At Halperin's suggestion that Saver see Bolich, Saver went to Washington (R. 329). Saver reported back, in November, 1948, that "Mr. Bolich said to him that if the taxpayers cooperated fully and developed

all of their income that he would recommend that the case be given a no-prosecution consideration" (R. 329). At about the same time (the $100,000 having been delivered by the Pattullo Modes people two weeks before, *supra*, pp. 21–22), Marks and Mrs. Segel became nervous and inquired of Davis, Hoffman and Halperin when the desired result would be accomplished (R. 107). Halperin assured them "that all the arrangements had been made, that the no-prosecution deal would go through" but that they had to wait for the proper time to accomplish it (R. 107).

During the balance of November and through December, 1948, Pattullo Modes cooperated fully with Special Agent Clayton (R. 428–429). In November, Clayton told Revenue Agent Scherm who was assisting him "that there appeared to be some unusual maneuvering going on behind this case and that he should never forget it" (R. 428). On December 13, 1948, Scherm prepared and submitted to Clayton an affidavit in connection with the alleged voluntary disclosure. (R. 427). On January 4, 1949, Clayton received affidavits from Marks, Mrs. Segel and the other Pattullo Modes stockholders admitting their tax evasion (R. 429–430). The disclosure was complete except for the unrecorded sales which had been made to raise the $100,000 cash "fee" held by Halperin for Grunewald (R. 844–845). Clayton, at this time, not having been advised that any commitment not to prosecute had been made (R. 430), was of the opinion that the Pattullo Modes case was well in line to go forward to prosecution (R. 431).

On January 5, 1949, Internal Revenue official Baradel (*supra*, p. 22) received a telephone call from Bolich asking whether or not he had the Pattullo Modes case before him for review. On learning that Baradel had not seen the case since he had rejected the claim of voluntary disclosure and that it was still with Clayton, Bolich remarked that he had been visited by Saver and that he had "decided that if they [Pattullo Modes] give full cooperation to the agents, we ought to close that case non-prosecution." Baradel, as instructed by Bolich, told Clayton the same day (R. 464–465, 477, 941–945). Bolich said that he would take full responsibility for the "no-prosecution" decision and that it should so appear in the record (R. 474). At the time of Bolich's phone call to Baradel, there had been no official notification to Bolich that the Pattullo Modes taxpayers had signed the statements the day before, January 4, 1949 (R. 432). The only official information that Bolich had received about the Pattullo Modes case was contained in a sketchy status report submitted by Clayton on August 6, 1948 (R. 432). Baradel told Clayton to write his report on the Pattullo Modes case as he wished, but if Clayton recommended criminal prosecution, he, Baradel would be compelled to overrule him (R. 431, 433). Bolich's promise that there would not be a prosecution effectively destroyed the criminal case against Pattullo Modes (R. 484–485, 489).

On January 10, 1949, a conference was held in Baradel's office, attended by the Pattullo Modes four principal stockholders (Mrs. Segel, Marks, Cohen, and

Zipser), lawyers Davis and Saver, and Internal Revenue officials Scherm, Clayton, and Baradel, at which time Saver said that he had received a commitment of "no-prosecution" from Bolich on his visit to Washington (R. 433, 477, 483). Baradel, reminding the taxpayers that they had been guilty of a crime, advised them that because of consideration being given them outside of his own office they were not going to be prosecuted (R. 111, 433). Pattullo Modes paid to the law firm of Schwaeber and Saver, who thought they had obtained the decision not to prosecute, a fee of $15,000 (R. 818–819, 832). Davis had previously told the Pattullo Modes principals that he wanted Mr. Saver to continue to believe that he, Saver, had obtained the decision (R. 37). Pattullo Modes paid out $303,500 in connection with their tax case, which included the $100,000 for Grunewald and $107,500 to Schopick and Davis (R. 816–818).

On January 13, 1949, after the Pattullo Modes taxpayers had learned from Baradel of the decision not to prosecute, Halperin, Hoffman, Schopick and Davis removed from the safe deposit box the $100,000 in cash that had been delivered to them by the Pattullo Modes principals (R. 225–226). After counting the money and putting it in two brief cases, Hoffman and Halperin left for Washington by train, taking the money with them (R. 226–227). Grunewald met Hoffman and Halperin at the Union Station when their train arrived in Washington, and walked off with Halperin taking both brief cases with them (R. 227–228). The records of the Washington Hotel,

Washington, D. C., show that Halperin checked in at the hotel on January 13, 1949, and checked out after remaining a few hours (R. 503–504). The room rent for that date was charged to Grunewald (R. 948). Halperin later reported that he had delivered the money to Grunewald (R. 332–333). Davis gave Halperin $6,000 in two checks, one for $2,500 dated November 10, 1948, and the other for $3,500, dated January 24, 1949, for his "compensation", thus far, in the Pattullo Modes case (R. 903).

In 1948 and 1949, while an audit to determine the amount of the Pattullo tax liabilities and civil fraud penalties was being conducted, the Pattullo taxpayers were cognizant of the danger of the audit "* * * upsetting the applecart * * *" (R. 127–129). Marks testified that Davis told them, before the audit, "to keep our mouths shut about anything that had happened, not to talk to anybody, not to talk to even our accountant, Mr. Smith, about what had transpired and this money going to Washington" (R. 33). A sum of $25,000 to $40,000 was paid by Pattullo Modes in about March 1949, for the "boys in New York," ostensibly so that on a detailed examination of the civil tax liability no one would "* * * raise a fuss about the phony deal that had been put through" (R. 38, 128, 835). The civil tax audit and determination of tax liability for Pattullo Modes for the years 1942–1946 was completed late in 1950 (R. 459–461, 815). Throughout 1951, the Pattullo Modes people made unrecorded sales in order to cover the moneys they had expended (R. 119, 823, 837–838).

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In November 1949, ten months after the decision not to prosecute, Special Agent Clayton's report was sent to Bolich by Baradel (R. 467–468). The report stated that Bolich's commitment to the Pattullo Modes taxpayers was the only reason that prosecution was not recommended (Gov. Ex. 56). Bolich, on receiving the report, called Baradel at his home on a Sunday and asked him to write an explanatory memorandum to "* * * take a little heat off the situation" (R. 467–468).

In June, 1950, Hoffman, business solicitor for Schopick and Davis (*supra*, p. 11, fn. 6), learned from an acquaintance, one Greenberg, an accountant, that his accounting firm was handling the tax matter of Clover Foundation, a manufacturer of ladies undergarments owned by Mr. and Mrs. Glover, in which there was an indicated tax evasion of $750,000 to $1,000,000 (R. 339–342, 406–407). At a meeting with the Glovers, arranged by Greenberg for June 28, 1950, Davis and Halperin stated that "there was a person in Washington whom we had used in other cases, and that we would expect to go to him with this case" (R. 342). Schopick and Davis were given a check by the Glovers for $2,500 as a retainer fee (R. 345). Halperin, after talking with Davis, went to Washington "for the purpose of finding out whether or not Mr. Grunewald could handle the matter for us and how much he would want" (R. 346). Since Grunewald wanted $175,000 or $200,000 and the Glovers offered to pay over not more than $100,000, the retainer of $2,500 was returned to them (R. 346–347). Between the time of the Glover nego-

tiations and early June of 1951, Halperin made as many as ten trips to Washington to see Grunewald (R. 529).

Grunewald rented a suite of rooms in the Washington Hotel, Washington, D. C., between March 28, 1948, and August 25, 1951 (R. 499–500, 509). Between March 28 and August 13, 1948, Grunewald occupied suite 405, 406 and 407 under his own name (R. 499). Grunewald occupied suite 319, 320 and 321 from November 22, 1948, to October 23, 1949, and suite 419, 420 and 421 from October 24, 1949, to October 25, 1950, which were then registered in the name of Harry Woodring (R. 499–500, 526, 947–948). He continued to occupy suite 419, 420 and 421 from October 25, 1950, to August 25, 1951, in his own name (R. 509). Bolich, after coming to Washington, registered in the Washington Hotel and occupied Room 511 from September 7 through November 19, 1948, and Room 851 for three days from November 19 to November 22, 1948 (R. 509). Though Bolich lived in suite 319, 320 and 321—Grunewald's suite—from November 22, 1948, forward, he was not billed for the room rent (R. 516, 526–527), but only for such services as valet, meals, long distance and local phone calls (R. 510). Not only did Grunewald provide a hotel suite for Bolich (R. 537), but in the summer of 1948, while Bolich was still Special Agent in Charge of the Investigations Division in the New York Office, Grunewald gave a party for him in anticipation of his appointment as Assistant Commissioner of Internal Revenue (R. 513–514). At the same time Grunewald also main-

tained a residence in Washington (R. 529, 535) and offices in the Munsey Building (R. 512, 535).

Nancy Hain was employed as a secretary by Grunewald from June, 1949, to January, 1950, and from June 1950, to February, 1951, in his suites in the Washington Hotel (R. 525–526). Grunewald, though not an attorney nor an accountant (R. 530), said to her that "when people had tax problems, they bring them to him and that he would get them fixed" (R. 530). He repeated this statement on more than one occasion (R. 531). Grunewald told Pulley, who occasionally ran errands for him (R. 513), that "tax business was good business; he could take care of tax business to the advantage of the taxpayer, both as to time and to amounts" (R. 515). During the time Mrs. Hain was employed by Grunewald she made telephone calls to Bolich for him and when asked who was calling, she answered, on instruction from Grunewald, that "Captain Henry was calling" (R. 530). Bolich's secretary also testified that she had received telephone calls for Bolich from "Captain Henry" (R. 498, 947). Grunewald, when using the phone, often called himself "Captain Henry" (R. 514, 539, 959). He had a private telephone in his suite that did not go through the hotel switchboard (R. 959).

In February, 1951, the King Committee[7] of the House Committee on Ways and Means began its investigation of the Bureau of Internal Revenue (R.

[7] The Subcommittee has been popularly referred to as the "King Committee" with respect to its activities during the period January 13, 1951, until January 14, 1953, and as the "Kean Committee" with respect to its activities during the period January 15, 1953, until October 30, 1953 (R. 403, 931).

403, 931). In June or July of the same year, Halperin told Schopick and Davis that a Congressional investigation was afoot which could look into the Pattullo Modes case and that they had better get hold of their clients (R. 354, 355). Marks and Mrs. Segel were called in to Davis' office and, in the presence of Halperin, Davis and Schopick, were warned of the impending investigation and told "that they should under no circumstances speak to anybody that comes to them" (R. 354, 845).

On August 15, 1951, Shapiro, an agent of the subcommittee, came to see Mrs. Segel who told him that Pattullo Modes first learned of its tax difficulties from a revenue agent (R. 355–356). When Davis learned of this answer, which refuted the claim of a voluntary disclosure by Pattullo Modes, Davis reported the event to Halperin, Schopick and Hoffman (R. 355–356). Davis, Halperin, Schopick and Hoffman then agreed that Marks and Mrs. Segel should retain a lawyer (R. 356).

During August, 1951, the subcommittee asked Internal Revenue official Baradel for the Pattullo Modes file (R. 942). Baradel discussed the request of the subcommittee for the Pattullo Modes file with Bolich while the latter, who was still Assistant Commissioner, was in the New York office of the Bureau (R. 942–943). At about this time, Halperin, when asked if Grunewald could be of any help, stated that "he was sure that Mr. Grunewald knows about it," and that if he were in a position to help that he would (R. 363).

On August 16, 1951, the day following Shapiro's interview with Mrs. Segel, a subcommittee subpoena

was issued to Smith, the Pattullo Modes accountant, who had filed the false affidavit of voluntary disclosure (R. 92, 357). Davis advised Smith, who had retained counsel (R. 93), to stick to his affidavit and to claim the client-attorney privilege in regard to all his dealings with Davis (R. 93, 357). Smith did as Davis instructed (R. 94–95). Davis, too, when called before the subcommittee lied when he said he believed the Smith affidavit on voluntary disclosure (R. 358).

About August 20, 1951, the Pattullo Modes people retained a lawyer to represent them in connection with the King Committee (R. 40–41). Davis was present at the initial conference and said that he would do most of the talking (R. 41, 357). Nothing was told this attorney about the $100,000 (R. 41, 357).

Smith was arrested on August 30, 1951, on a charge of having filed a false affidavit (R. 42, 359). Thereafter, Halperin, Davis, Hoffman and Schopick met to decide on a course of action (R. 359). Davis told Marks and Mrs. Segel that "the arrest was a pressure move to get the rest of us to talk" (R. 359–360).

On December 11, 1951, the King Subcommittee subpoenaed the Washington Hotel records covering the period from June 22, 1949, to June 22, 1950 (R. 948–951). The hotel management, discovering that the subpoenaed bills had not been replaced in the files and could not be found, wrote a letter to Bolich asking him to return them (R. 951). These same files had been loaned to Bolich in the summer of 1950 (R. 949–950). On December 20, 1951, Bolich telephoned the hotel manager at his home and said that he had never received the records (R. 951–954). During the

period covered by the lost records, Bolich lived in the suites occupied by Grunewald and registered in the name of Harry Woodring (R. 954–955). On September 28, 1950, Bolich had hired Olsen, a carpenter, to cut out a section from the baseboard in a closet in his New York home to make a hiding place for secret Washington papers (R. 543–545).

In February, 1952, a grand jury was empanelled in the Eastern District of New York to investigate violations of the Internal Revenue laws and their administration and enforcement (R. 402–403, 931). Davis, Halperin, Hoffman and Schopick, on learning of the pending grand jury investigation, discussed it among themselves and concluded that the grand jury would not be in a position to find any indictments because there was no act committed in the Eastern District (R. 360–361). They were all of the opinion that the clients would plead their constitutional privilege before the grand jury (R. 361).

Revenue agents sent to examine the books of Schopick and Davis asked for an explanation of the $500 check drawn by Smith to Deutsch, *supra*, p. 12 (R. 361, 826–827). Schopick explained that the check was a loan from Hoffman to his brother-in-law Deutsch (R. 361), when in fact it was actually given to Deutsch for his aid in bringing Pattullo Modes to Schopick and Davis (R. 22, 97, 207, 361). Hoffman instructed Deutsch not to say anything before the grand jury (R. 813–814). When Smith was subpoenaed before the grand jury, Schopick told him to say that the $500 check was given Deutsch as an indirect loan from Hoffman (R. 96–97, 361).

During the next few months, following the empanelling of the grand jury, Deutsch, Hoffman, Halperin, Schopick, Davis, the Pattullo Modes stockholders, the Gotham Beef taxpayers and Grunewald's secretary, Nancy Hain, were subpoenaed as witnesses (R. 44, 150, 363, 531). Davis, Hoffman, Halperin and Schopick met in March, 1952, and, though they felt that the Pattullo Modes people "were going their own way," it was agreed that Davis "should nevertheless try to communicate with Mr. Marks" (R. 362). Davis saw Marks and, after imploring Marks not to talk, said that he "* * * would be crazy to talk * * *" and asked "Morton, are you going to turn me in?" (R. 45, 362). Davis also saw Mrs. Segel and urged her to lie before the grand jury about what had transpired in the Pattullo Modes case (R. 116–118). Marks and Mrs. Segel, however, decided to tell their story to the grand jury (R. 45, 125).

In early 1952, Halperin and Davis told Tobias of the Gotham Beef Company that no one had talked about the Gotham case and that if everyone was quiet the investigation would blow over (R. 170). In February, 1952, they again visited Tobias and told him that he, Tobias, and Berman (of Gotham Beef) should remain silent; that Halperin had done Berman a good turn and Berman should not hurt him by talking (R. 171, 870). The Pattullo Modes people had testified before the grand jury before Halperin again saw Tobias (R. 171). When Halperin did meet Tobias, he sought to persuade Tobias and Berman to remain silent, stating that the "Washington associate"

was going to "stand silent"; that he, Halperin, would be silent; and it would be a terrible thing for him if they testified (R. 171–172). When Tobias asked Davis if Grunewald was the man who was involved, Davis said, "It is none of your business" (R. 171, 871).

On May 13, 1952, Nancy Hain, Grunewald's personal secretary, was subpoenaed to appear before the grand jury (R. 531). She knew that Halperin had visited Grunewald often; that Bolich had lived in Grunewald's suite at the Washington Hotel for a time; that Grunewald used the name "Captain Henry"; and that Grunewald had said that people with tax problems would bring them to him and that he would get them fixed (R. 525–531). Immediately after she was subpoenaed, Grunewald phoned and offered to furnish her money for a trip to New York telling her that she "* * * didn't need to discuss it, and * * * [she] could just say [she] didn't remember" (R. 531–533). Grunewald's messenger arrived that night with the money for her (R. 533). Mrs. Hain falsely stated, in response to some question put to her by the United States Attorney, that she did not remember (R. 534). She returned the money to Grunewald by registered mail (R. 533).

2. In submitting the conspiracy count to the jury, the trial court (District Judge Dawson) pointed out that the indictment charged that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation (see *supra,* p. 9, fn. 2), should investigation thereafter eventuate, and that this was an important element in view of the three-

year statute of limitations (R. 732). He charged (R. 733–735):

> To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. *If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment.* If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part

of the conspiracy. *However, you must additionally determine whether this objective of the conspiracy was known to the defendants.* If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One.

Now, therefore, as to the defendants Halperin, Grunewald, and Bolich, you have the questions of fact, first, as to whether they became parties to a conspiracy to defraud the United States, and that part of this conspiracy was to make continuing efforts to avoid detection and prosecution by any governmental body; second, whether they knew the general objectives of the conspiracy; and third, whether any one of the conspirators took any overt act within three years prior to October 25, 1954, to accomplish the result of that conspiracy. If you can answer these questions all in the affirmative, beyond a reasonable doubt, then you would be justified in returning a verdict of guilty on the first count of the indictment as against each one of these three defendants. If you cannot find that you can answer these questions in the affirmative, beyond a reasonable doubt, as to these three defendants, then as to the ones concerning whom you cannot so answer it, you should return a verdict of not guilty. [Emphasis added.]

SUMMARY OF ARGUMENT

The sufficiency of the evidence to support the verdict that petitioners engaged in a tax-fixing conspiracy is not before this Court. We shall therefore assume what the court below found, namely that the evidence fully proved the existence of a tax-fixing ring involving a high official in the Bureau of Internal Revenue (Bolich) and the two other petitioners.

I.

The statement of the questions presented, as it appears in the Court's order granting certiorari (*supra*, pp. 2–6), is derived from the petitions for certiorari. As phrased, the questions contain significant assumptions which pose issues not raised on this record. For example, in the questions dealing with the statute of limitations there is the important assumption that the original conspiracy terminated prior to the overt acts of concealment on which the Government relies to bring the conspiracy within the three year term of the statute. On the basis of that assumption, the decision of this Court in *Krulewitch* v. *United States*, 336 U. S. 440, would be controlling and the action would be barred. However, the real issue posed by the case is whether the jury, under its instructions, could properly have found that the conspiracy was a continuing one which included an initial agreement to conceal and that the overt acts of concealment within the period of the statute were in furtherance of that conspiracy.

The record clearly supports the charge in the indictment that a tax-fixing apparatus was established to service distressed taxpayers whenever they could be

induced to pay the asking price. Instead of separate arrangements to process the problems of Pattullo Modes and the Gotham Beef Company and Clover Foundation, the conspirators were prepared to apply their peculiar talents to these or other cases as the occasion permitted or invited. This is a far different situation from that presented in *Kotteakos* v. *United States,* 328 U. S. 750, where the government attempted to treat as a single conspiracy the various activities of separate persons who stood in the place, not of the fixers, but of the taxpayers here. It is far closer factually to *Blumenthal* v. *United States,* 332 U. S. 539, where an entire ring was included even though different members performed specialized activities in aid of the single conspiracy.

Also, it was clear from the start that all parties were in agreement that secrecy was essential to the successful operation of the project. Not only the details of the process, but also the names of the participants, were concealed from the taxpayers by mutual agreement. Thus, the overt acts of concealment were not an afterthought or the acts of individuals saving themselves, but a real part of the original plan. The dissenting judge's argument that such an agreement may not be implied from actions, particularly in its application to acts during the period when the conspiracy was active in all its aims, finds no support in the cases. The details of conspiracies must frequently be established by circumstantial evidence. Neither *Krulewitch* v. *United States,* 336 U. S. 440, nor *Lutwak* v. *United States,* 344 U. S. 604, relied on by the petitioners, holds to the contrary; both recog-

nize that in some conspiracies the element of concealment is a part of the agreement. In every case it must be a question of fact for the jury to decide on proper instructions. Here, the jury was correctly instructed that in order to convict it must find that there was agreement to conceal, and that it must make that finding on the basis of evidence, not by implication from the conspiracy to perform the illegal acts. And there was ample evidence to support the jury's verdict on that issue.

The conspiracy from the start had three main objectives: first, to obtain decisions from the Bureau of Internal Revenue not to institute criminal prosecutions; second, to protect those decisions by concealing the manner in which they were obtained; and, third, to protect the conspirators by hiding both its processes and its membership. The statute of limitations was three years, and overt acts would have to be proved subsequent to October 25, 1951, to prevent the action from being barred when the indictment was brought on October 25, 1954. Since the congressional investigation of the Bureau of Internal Revenue commenced before the 1951 date, the opportunity of obtaining *new* business was somewhat reduced. But the need to protect the results of *past* activities, *i. e.* to hold the line against criminal prosecution of Patullo Modes and Gotham Beef, still continued, as did the need to protect the conspirators themselves from disclosure or prosecution. Overt acts, after October 25, 1951, to accomplish these ends were fully proved. Since they were in pursuance of the original conspiracy, they

prevented the statute of limitations from barring this proceeding.

II.

In various forms, the petitioners claim that the trial court erred in permitting the government to cross-examine the petitioner Halperin, who was the only defendant to take the stand, with respect to his prior claim of self-incrimination before a grand jury in connection with the same questions which he answered at the trial. The trial court instructed the jury that this evidence could be considered only with respect to the credibility of Halperin's testimony and that it was not permissible to draw any inference of guilt from the claim of privilege.

Petitioners recognize that a similar problem was before this Court in *Raffel* v. *United States,* 271 U. S. 494, where the decision was in favor of the admissibility of the evidence for the limited purpose of testing credibility. Petitioners argue, however, that *Raffel* was wrongly decided, that it is inapplicable here since the present claim was made in a grand jury proceeding, and that later decisions of this Court show a withdrawal from the *Raffel* ruling.

As to *Raffel's* being wrong, we submit that it is entirely consistent with the general rule that, when a defendant takes the stand, he subjects his testimony to the usual tests of cross-examination and rebuttal and his own credibility to the judgment of the jury. A prior refusal to answer questions which a defendant now answers on trial presents an inconsistency which a jury is entitled to consider. The witness may ex-

plain the difference in his position, but the sufficiency of the explanation is strictly a jury question.

The *Raffel* decision has been frequently followed where the prior claim was asserted before a grand jury. The only real relevance of the nature of the proceeding in which the claim is asserted is that, where the circumstances of testifying are different, the difference in position is more easily explained. But the difference in circumstances between a grand jury and a petit jury is not so great as to eliminate the inconsistency. Therefore, the evidence of a prior claim of privilege is still relevant and the clear holding of the *Raffel* case is that the waiver when a defendant takes the stand is complete for all purposes.

As for this Court's asserted withdrawal from the position it took in *Raffel,* in none of the many cases in which the Court has expressed its ungrudging support of the constitutional privilege against self-incrimination has it withdrawn at all from the view that the privilege may be waived. Cf. *Rogers* v. *United States,* 340 U. S. 367. Both *Johnson* v. *United States,* 318 U. S. 189, and *Slochower* v. *Board of Higher Education,* 350 U. S. 551, forbid the use of the claim of privilege as a basis for implying guilt. Cf. *Ullmann* v. *United States,* 350 U. S. 422. No such implication is here involved.

Finally, petitioners complain of the form of the trial judge's instructions to the jury, warning them against the implication of guilt. The instruction proposed by petitioners is probably correct, but it was neither as complete nor as specific as the phraseology employed by the court. Obviously, there is no

obligation on a trial court to adopt the wording suggested by a defendant so long as the court's own instructions are correct.

III

The third issue is whether it infringed upon petitioner Halperin's constitutional rights to subpoena him to testify before the grand jury in Brooklyn in view of the fact that prior witnesses had already implicated him in the conspiracy. The petitioner states the issue in terms of his being a "*de facto* defendant" subjected to "unsanctioned examination before trial."

Actually, the Brooklyn grand jury was involved in a general broad-scale investigation of fraud in the Bureau of Internal Revenue. Even if Halperin was implicated, there can be no doubt that the primary object of the investigation was to uncover the facts about the Bureau and the official personnel involved, concerning which Halperin might be in a position to furnish information. As to the particular conspiracy here involved, the Brooklyn grand jury had no jurisdiction to indict; the indictment was eventually brought in the Southern District of New York. And it is far from clear that the jury had sufficient information to reach even a tentative conclusion that Halperin was guilty of a federal crime.

On this type of record there is no basis for resolving the issue of whether a "*de facto* defendant" may be called before a grand jury, a proposition as to which there is a sharp split of authority. Even those jurisdictions which hold that a "*de facto* defendant" may not be called as a witness before a grand jury

do not extend that theory to persons who are merely generally involved and whose testimony is essential to complete the investigation. To limit the powers of the grand jury in such a case as this would immeasurably hinder the performance of its true function to investigate and then accuse, but not to try cases. It would force investigative work into the hands of other agencies where the rights of the accused have fewer safeguards. Thus, both the interests of law enforcement and of persons under suspicion are best preserved by maintaining the historic freedom of the grand jury to investigate where it will.

IV

Petitioner Halperin's argument, that the alleged obstruction of justice, covered by Counts 5, 6 and 7, of which he alone was found guilty, consisted merely of advising witnesses to plead the protection of the Fifth Amendment in order to protect themselves, is patently without foundation. The record made it clear that Halperin was not consulted by the witnesses as their lawyer, but that he and his associates went to them pleading that they should not make disclosures to the grand jury. Halperin was trying to save his own skin, not theirs. The trial court correctly instructed the jury that to convict it must find more than advice on constitutional rights, it must find a deliberate intent to impede judicial proceedings. The evidence amply supported the jury in so finding.

ARGUMENT

The essential issue which was submitted to the jury, whether or not these petitioners were involved in a

tax-fixing conspiracy, is not before this Court under the limitations written into the grant of the writs of certiorari. This makes it superfluous to recite the evidentiary details supporting the government's charge that one of the petitioners, a very high official in the Bureau of Internal Revenue, was guilty of betraying his trust and that the other two were guilty of subverting him in a vital field of government. The court below found (Vol. V, App. 291):

> The proof of the existence of a single, overall conspiracy is simply overwhelming. The complicity of Halperin, as well as Davis, Hoffman and others, is established beyond peradventure of a doubt. The evidence is no less convincing against Grunewald and Bolich, and the jury were warranted in drawing the conclusion that all the circumstances taken together established beyond reasonable doubt that Grunewald and Bolich were not only members of the conspiracy, but that they were "the fixers."

It is in the context of this proved conspiracy that we discuss the issues which the Court has indicated it will consider.

I

THE INDICTMENT CHARGED, AND THE EVIDENCE SUPPORTED THE JURY IN FINDING, THAT THERE WAS ONE GENERAL CONSPIRACY WHICH FROM ITS INCEPTION CONTEMPLATED ACTS OF CONCEALMENT AND THAT THERE WERE OVERT ACTS OF CONCEALMENT IN FURTHERANCE OF THAT CONSPIRACY WITHIN THE PERIOD OF LIMITATIONS

Nine[8] of the nineteen questions enumerated in the order of this Court granting the petitions for writs

[8] Case No. 183, Questions 1, 2, 3, 4 and 5; Case No. 184, Questions 8 and 9; Case No. 186, Questions Nos. 1 and 2.

of certiorari (*supra*, pp. 2–6) concern the scope of the conspiracy charged against petitioners in the indictment and proved on the trial. The phrasing (which is the same as appears in the petitions for the writs of certiorari) in many instances, particularly in No. 183 (*supra*, p. 2), assumes as established what is really the matter at issue, *i. e.* that the original conspiracy had been terminated before the overt acts of concealment occurred,[9] and that the acts of concealment were at most pursuant to an independent, separate, later conspiracy.

As phrased by the government in its brief in opposition, the question is:

> Whether the jury could properly find that a conspiracy to defraud the United States in the operation of the internal revenue laws was in existence during the applicable three-year statute of limitations under instructions authorizing them to convict only if they found that agreement to conceal the initial fraud was part of the continuing agreement to conceal the acts done, that such an agreement was known to each of the participants, and that it was established by evidence other than implication from the crime itself.

However phrased, the prime issue which the Court has agreed to consider concerning this conspiracy is whether or not prosecution was barred by the statute of limitations.[10] Admittedly, the only overt acts al-

[9] On that basis, there would be no dispute that the acts of concealment would not have been in furtherance of the conspiracy. *Krulewitch* v. *United States*, 336 U. S. 440.

[10] 18 U. S. C. 3282, as enacted by the Act of June 25, 1948, c. 645, 62 Stat. 828, was considered by all parties at the trial as

leged and proved to have been committed within the three-year period next preceding the return of the indictment on October 25, 1954 (*i. e.*, October 25, 1951–October 25, 1954), were acts of concealment.[11] Petitioners argue that these overt acts of concealment are not sufficient to toll the running of the statute of limitation; that the actual conspiracy had ended more than three years before October 25, 1954; and that their acts of concealment were either independent acts of the individual petitioners, done to conceal their own wrongdoing, or the consequences of a new and separate conspiracy entered into subsequent to the completion of the original conspiracy. It becomes necessary therefore to determine what was the scope and extent of the conspiracy charged and proved. This in turn raises the questions: (1) whether the evidence proved one general continuing conspiracy, or multiple separate conspiracies; (2) whether that conspiracy did embrace, as an integral part, an agreement to conceal the conspiracy, the conspirators, and the acts done pursuant to the conspiracy; (3) whether, as a matter of law, a conspiracy to defraud can ever include a conspiracy to conceal; and (4) finally—the

applicable. This section provided that prosecution must be instituted within three years next after the offense. By the Act of September 1, 1954, c. 1214, § 10 (a), 68 Stat. 1145, 18 U. S. C. 3282 was amended to provide a five-year period of limitations.

[11] Since the statute extending the period of limitations to five years was by its terms made applicable to offenses not barred on its effective date, namely September 1, 1954 (18 U. S. C. (Supp. III) 3282), the crucial date for overt acts to bring the conspiracy within the period of the statute was September 1, 1951, rather than October 25, 1951. However, the court instructed the jury on the basis of the later date and the error was of course in favor of the petitioners.

heart of this case—whether the overt acts of concealment, as distinct from the overt acts of fraud, were in furtherance of that single continuing conspiracy.

A. THE RECORD REVEALS THAT THERE WAS ONE BROAD, GENERAL, CONTINUING CONSPIRACY TO DEFRAUD THE UNITED STATES WHICH INCLUDED, FROM THE BEGINNING, A KNOWN UNDERSTANDING TO CONCEAL THE CONSPIRACY, THE CONSPIRATORS, AND THE ACTS DONE PURSUANT TO THE CONSPIRACY

Petitioners argue that the activities with respect to each taxpayer were separate and distinct, and that the acts of concealment were, if not merely individual acts to save themselves, at most independent of all activities in relation to the taxpayers. The indictment charged, and the verdict (in the light of the judge's charge) found, that the activities described in the Statement, *supra,* were pursuant to one general scheme. The evidence fully supports that basic conclusion.

1. The actions with relation to the individual taxpayers were not separate and distinct, but were part of the activities of one, general, tax-fixing ring. The conspiracy was designed to link taxpayers in difficulties to Bolich, who as a high Internal Revenue official had power to get them out of trouble. The ring consisted of men (Hoffman, Greenstein) to seek out taxpayers in trouble and bring them to Schopick and Davis, ostensibly as lawyers. Schopick and Davis, in turn, used Halperin, their close associate, to make the contact with Grunewald and he, in turn, was the link to Bolich. This general machinery was established and ready to operate whenever there could be found a taxpayer willing to pay enough for the "services."

From the viewpoint of these petitioners (Bolich, Grunewald and Halperin), all of whom operated with a view to fixing tax cases, the individual taxpayers were merely the "customers" to whom "services" were sold pursuant to the general conspiratorial arrangement.

The interrelationship of the individual taxpayers' cases to the general conspiracy in which petitioners were engaged is well illustrated by the fact that, when the Gotham Beef and Pattullo Modes cases were being handled at overlapping times, the conspirators lowered the price to Gotham Beef because they wanted to be in a firm position to assert that they could actually deliver what they promised in the bigger case of Pattullo Modes (see the Statement, *supra,* p. 17). Having succeeded with Gotham Beef, they felt that they could charge a higher price as to Pattullo Modes. And then, secure in the knowledge that the conspiracy was working, they tried to charge the Clover Company more than it was willing to pay (*supra,* p. 28).

On these facts, it is clear that the case of *Kotteakos* v. *United States,* 328 U. S. 750, on which petitioners rely, is wholly inapposite. There the central figure, through whom fraudulent applications for housing loans were processed, had pleaded guilty and was not before the Court. The indictment sought to link in one conspiracy thirty-two defendants who merely used the same intermediary, each solely for his own purpose. The government in its brief conceded that the persons who used the services of the intermediary, without knowledge of each other, and without knowledge that there was any central scheme in operation,

could not be said to have been joined in one conspiracy. But even on that set of facts, there can be no doubt that, if the central figure had not been an individual, but a group operating together, who processed all the fraudulent applications they could get, the central group itself would have been engaged in one conspiracy. See *Canella* v. *United States,* 157 F. 2d 470, 478–479 (C. A. 9), where the Court of Appeals held that the central figure engaged in various frauds was properly convicted on a charge of a single conspiracy even though the fraudulent activities were so different that participants in particular aspects thereof should not all have been joined with the center. In *Blumenthal* v. *United States,* 332 U. S. 539, involving a conspiracy to sell liquor at over the ceiling prices, the five defendants fell into two groups—two who were the putative owners of whiskey and three who acted as salesmen without knowledge of each other. The Court had no problem as to the implication of the putative owners, the central figures, in the whole conspiracy (see 332 U. S. at p. 553). It held that even the salesmen, who were not shown to have known each other or the exact limits of the plan, were nevertheless part of single conspiracy, joined in the attainment of a common goal (332 U. S. at pp. 556–559). *A fortiori* here, where all the petitioners were part of the central tax-fixing ring, aware of each other's position, it is clear that there was one general conspiracy to defraud the United States in the operation of the internal revenue laws as to any tax cases in which a large enough bribe or influence-payment could be obtained.

It is also clear that this conspiracy continued well beyond January 4, 1949, when the decision not to prosecute was reached in the Pattullo Modes case. It was still set up and ready for action in June, 1950, when the effort was made to get a huge price from the Clover Foundation. It may not have been active at all times because clients of the desired magnitude were not easy to obtain, but the relationship among the conspirators, their mutual understanding, was a continuing one. The terminal date of the conspiracy is a matter we discuss, *infra*, pp. 60–65. The point we make here is that the conspiracy, in its inception, contemplated a continuing undertaking.

2. From the very nature of the conspiracy as a scheme to set up a tax-fixing business, there had to be, and was, from the outset a conscious, deliberate, agreement to conceal, not only the particular actions with respect to individual taxpayers, but each and every aspect of the conspiracy, from the interest of the "chaser" to the identity of Grunewald and Bolich, the top figures. Such concealment would manifestly serve two objects: (1) it would enable the ring to stay in business so that they could get other cases; and (2) it would preserve the fruits of what had already been accomplished—the decision not to prosecute on behalf of the taxpayers who had already utilized the "services" of the ring. The two objectives were of course interrelated. Discovery of the fraud by which a single decision not to prosecute was obtained would jeopardize the success of the entire conspiracy. Discovery of the over-all conspiracy would cast doubt upon the validity of all decisions

not to prosecute entered in all cases which had been handled by the conspiracy. Concealment of all phases of the operation was absolutely essential. The indictment charged that concealment was specifically a part of the conspiracy,[12] and the evidence proved it, not only in the later stages of the illicit relationship, but from its very inception.

The record is replete with specific evidence that *from the beginning* the conspiracy, as conceived and put into operation by the conspirators, included as an integral part an agreement to conceal the conspirators and their conspiracy. The conspirators, in all their contacts with their tax evading clients, Pattullo Modes, Gotham Beef Company and the Clover Foundation, carefully withheld the identity of their contact man in the capital. They invariably referred to him as the "Washington associate" or the "man in Washington." Even when forthrightly asked by repre-

[12] Count 1 of the indictment alleged (R. 6-7):

"7. It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative and judicial, of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, * * *.

* * * * *

"13. It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy.

"14. It was further a part of the conspiracy that the defendants and co-conspirators would misrepresent, and conceal and cause to be misrepresented and concealed the acts done pursuant to the conspiracy and the true nature of the conspiracy by any means whatsoever, * * *."

sentatives of the clients if the man in Washington was Grunewald, the conspirators insisted that it was none of the client's business (*supra,* p. 35). The identity of Bolich was even more carefully concealed.

The record also established that the conspirators were aware from the beginning of the need to cover up in order to prevent upsetting the no-prosecution decisions. Particularly in relation to Pattullo Modes, the evidence is unmistakable that there was a general understanding of the danger of "upsetting the apple-cart" (R. 127–129). Pattullo Modes was instructed not to sell its assets nor make withdrawals from its accounts to raise the $100,000 bribe, lest the money be traceable. The retainer of the firm of Schwaeber and Saver was continued at Grunewald's direction to cover the activities of the conspirators. When the decision not to prosecute was rendered in behalf of Pattullo Modes, Grunewald instructed the taxpayers to let Schwaeber and Saver think they had accomplished the result even though the taxpayers knew they had actually done nothing to achieve that end. After the decision not to prosecute, money was collected to be given to the men in New York who were to determine the civil liability, in order to forestall disclosure (R. 38, 128, 835). Even the accountant, Smith, who had made a false affidavit on behalf of Pattullo Modes, was not to be told about what had occurred in Washington (R. 33). And as late as August, 1951, after the representative of the King Committee had called at Pattullo Modes, the taxpayers and Davis showed their understanding of the continuing need for concealment by failing to disclose,

to the new attorney they had retained, the facts as to the $100,000 bribe (R. 41, 357).

The evidence thus amply established as a matter of fact, what the indictment charged, that there existed a single conspiracy to defraud the United States in the operation of the Internal Revenue laws, both in the "fixing" of the tax cases and in the continuous concealment of the conspiracy, the identity of the conspirators, and the acts done pursuant to the conspiracy.

B. AS A MATTER OF LAW, A CONSPIRACY TO DEFRAUD CAN INCLUDE, AS AN INTEGRAL PART, A CONSPIRACY TO CONCEAL

It hardly needs elaboration that a conspiracy can in fact embrace a specific agreement to conceal the conspiracy, and that in such a case overt acts of concealment are in furtherance of the conspiracy. For example, in a conspiracy to commit espionage, it would hardly be unusual for the spies to agree to conceal their acquaintance with their co-conspirators as a part of, and in furtherance of, the conspiracy. In the crime of kidnapping, the acts of conspirators in hiding while waiting for ransom would clearly be planned acts of concealment which would be in aid of the conspiracy to kidnap. So here, there can be no doubt that, so long as the ring was set up and ready to operate, all acts of concealment, whether to hide the identity of the conspirators or the action theretofore taken, were unquestionably in furtherance of the initial conspiracy as planned by the conspirators. The agreement to cover up acts of wrongdoing by an official of the government is itself a conspiracy to impair honest administration, and thus a conspiracy to defraud. *Haas* v. *Henkel,* 216 U. S. 477. Had petitioners agreed only

to cover up acts in which they had no part, they would have been parties to a conspiracy to defraud the United States in the operation of the Internal Revenue laws. They were no less parties to such a conspiracy because they planned to defraud the United States both by perpetrating the initial act of serious wrongdoing, and by planning to keep those acts from being discovered.

Nothing in the decisions of this Court in *Krulewitch* v. *United States,* 336 U. S. 440, and *Lutwak* v. *United States,* 344 U. S. 604, relied upon in the dissent below [13] and by petitioners here, justifies the assumption, which would be contrary to all reason, that *no* conspiracy charge can ever embrace an agreement to conceal the conspiracy, no matter when the acts of concealment occurred and no matter what the evidence of such an actual agreement to conceal. On the contrary, both opinions recognize that agreements to conceal can

[13] The dissenting judge in the court below drew a general distinction between agreements to conceal, based in this type of case on whether the object of concealment was to give continuing protection against criminal prosecution to taxpayers, or to protect the conspirators from discovery. If the former, he appears to agree that overt acts occurring after the original decisions not to prosecute can support a jury finding of a continuing conspiracy. However, if the concealment was intended to protect the conspirators only, then he argues that the existence of the agreement may not be proved by overt acts of concealment. We take issue with this position if the opinion means, as it seems to, that the agreement to conceal cannot be proved by consensual overt acts of concealment pursued from the very commencement of the conspiracy. If that is what the dissenting judge meant, it is equivalent to saying that an agreement to conceal may never be founded on circumstantial evidence, however convincing. Certainly, the cases cited do not support such a conclusion.

factually be parts of conspiracies to commit other crimes.

In *Krulewitch* v. *United States,* 336 U. S. 440, the Court was concerned with a problem of admitting hearsay evidence on the trial of the defendants. Krulewitch and a woman associate had been charged with conspiring to violate the White Slave Traffic Act (18 U. S. C. 2421, 2422) in that they had agreed to persuade and induce another woman to go from New York City to Miami, Florida, for the purpose of prostitution. The woman had been transported to Miami on October 20, 1941. After the defendant, his co-conspirator, and the victim, who was the complaining witness, had been arrested in Florida and had thereafter returned to New York, the complaining witness had a conversation with the co-conspirator in December, 1941, which seriously implicated the defendant. When the government, on the trial of the defendant, sought to introduce this conversation in evidence, defendant objected that it was not admissible, the conspiracy having ended when the victim arrived in Miami. The trial court admitted it, and defendant was convicted. This Court reversed the conviction on the ground that the testimony was not admissible as made in furtherance of the conspiracy since the conspiracy had clearly ended at the time the statement was made. It refused to accede to the government's argument (which we do not repeat here) that, since a subsidiary agreement to conceal is implicit in every conspiracy, the declaration was in furtherance of the original conspiracy.

Mr. Justice Jackson, in his concurring opinion, wrote a penetrating critique of the dangers of conspiracy prosecutions to the fair administration of justice. Even though he thoroughly excoriated the theory that there can be an implied conspiracy-to-conceal latent in every criminal conspiracy, he stated at pages 455–456:

> * * * Of course, if an understanding for continuous aid [concealment] had been proven, it would be embraced in the conspiracy by evidence and there would be no need to imply such an agreement.

In thus rejecting implied agreements to conceal, he recognized the very real possibility of actual, proved, agreements-to-conceal being an integral part of a conspiracy.

In *Lutwak* v. *United States, supra,* the indictment, charging Lutwak and others with conspiracy to defraud the United States in its administration of the immigration laws, alleged that the conspirators agreed to conceal their acts to prevent disclosure of the conspiracy. The substance of the conspiracy was that the defendants, veterans of the United States Armed Forces, would go abroad, enter into putative marriages, procure the entry of the alien spouses into the United States under the War Brides Act (59 Stat. 659, 8 U. S. C. 232), and then take steps to sever the legal matrimonial ties. Most of the evidence adduced on the trial consisted of testimony of the individual acts and declarations of the defendants. They contended that, since some of the acts and declarations were made after the conspiracy ended, they were not

properly restricted, when admitted, to the defendant who did the act or made the statement testified to. The critical issue, therefore, was when did the conspiracy end. Defendants insisted it ended when the last of the conspiratorial parties was admitted to the United States on December 5, 1947. The government urged that the agreement of the conspirators to conceal the conspiracy, as alleged in the indictment, protracted its life. The Court, after examining the record, stated at page 616:

> But there is no statement in the indictment of a single overt act of concealment that was committed after December 5, 1947, and no substantial evidence of any. Such acts as were set forth *and proved were acts that revealed and did not conceal the fraud.* Therefore, there is no evidence in the record to establish as a part of the conspiracy that the conspirators agreed to conceal the conspiracy by doing what was necessary and expedient to prevent its disclosure. [Emphasis added.]

It concluded that the agreement to conceal, though alleged in the indictment as a part of the conspiracy, "was not proved." This is far from saying that agreement to conceal the crime can never be proved. Indeed, the underlying assumption of the opinion is that such an agreement could be shown if it existed in fact.

In short, the issue of whether an agreement to conceal is actually a part of a conspiracy to violate federal laws is solely one of fact to be proved by the government and found by the jury under proper instructions.

C. THE ACTS OF CONCEALMENT HERE PROVED WERE PART OF AND IN FURTHERANCE OF THE ORIGINAL CONSPIRACY

Whether particular acts of concealment are in furtherance of a conspiracy is also a question of fact, and not of law. Its resolution depends on the nature and duration of the conspiracy and the relation of the acts of concealment with respect thereto. See Wharton, *Criminal Evidence* (11th ed. 1935), vol. 2, pp. 1200–1202. Thus the only real problem here with relation to the acts of concealment is a factual one. Was the original conspiracy, with its ramifications, including the initial agreement to conceal, still in existence when overt acts were performed during the period of limitations (October 25, 1951–October 25, 1954)? Were the overt acts of concealment during the period of limitations in furtherance of that original conspiracy, or were they in furtherance of a new conspiracy, entered into after the original conspiracy had terminated? The jury, under the judge's charge, which posed these very questions for its consideration (see *supra*, pp. 36–37), found that the overt acts of concealment performed during the period of limitations were part of, and in furtherance of, the initial conspiracy. The evidence also supports that aspect of the verdict.

As we have demonstrated, *supra*, pp. 48–54, the initial agreement among the conspirators, from the beginning, contemplated at least this much—the "fixing" of tax cases for those who would pay for such "services," concealment of the relationship among the conspirators, concealment of the action taken pursuant to the conspiracy for the purposes of protecting both the conspirators and the taxpayers.

It is fair to assume, on this record, that the first of these objectives—the "fixing" of tax cases—became less important before the crucial date, October 25, 1951, three years before the date of the indictment, October 25, 1954. As we have shown, the date of completion cannot be set as early as petitioners would fix it, with the decision not to prosecute in the Pattullo Modes case in January 4, 1949. The conspiracy was clearly in existence in the summer of 1950, when the attempt was made to get the Clover Company and its owners as customers of the ring. Normally, with this proof of a planned conspiracy of indefinite duration, the presumption of continuance would justify an inference that the conspiracy continued for the full time that Bolich was in office. But in the light of the fact that by June, 1951, the King Committee was investigating tax frauds in general, and that there was a possibility that it would investigate the Pattullo Modes case in particular, it is reasonable to conclude that the possibility of securing new business was somewhat curtailed.

The other objectives of the conspiracy, however, were obviously in full force, and in fact took on new impetus in the face of the King Committee investigation. Bolich was still in office when the King Committee started its investigations and continued as an employee of the bureau until November 16, 1951 (Gov't Ex. 1d). It was obviously tremendously important to all of the participants that their initial plan to conceal what they had done should continue. Moreover, the statute of limitations had not run against the taxpayers for whom favorable results had been

unlawfully accomplished. Under 26 U. S. C. (1940 ed.) 3748, the term for criminal liability for tax evasion was six years, and this period would not expire until 1953, since the last return was filed in 1947. Those paid-for results were clearly in danger and had to be protected.

The evidence discloses actions by the conspirators in complete accord with their original understanding. In June, 1951, petitioner Halperin, who made repeated trips to Washington, reported that there was a possibility that Pattullo Modes would be investigated. Immediately, the New York conspirators took action, calling in the taxpayers and warning them that they were not to talk to anyone. When one of the Pattullo Modes stockholders (Mrs. Segel) slipped and suggested enough to make the committee's investigator suspicious that all was not what it appeared to be, further action became necessary. *Supra,* pp. 31–32. But even then, the understanding that it was necessary to conceal the $100,000 bribe was evidenced by the fact that information as to the payment was withheld from the new attorney who was retained to represent the Pattullo Modes people (*supra,* p. 32). And not long thereafter, in December, 1951, within the period of limitation, Bolich showed his understanding of the need for concealment by denying that he had obtained the subpoenaed hotel records which would have shown his close connection with Grunewald (*supra,* pp. 32–33).

By the time of the Brooklyn grand jury investigation, in February, 1952, the object of protecting the taxpayers must finally, we think, be deemed to have been

abandoned by these conspirators. By this time, the conspirators were aware that the Pattullo Modes people were following their own course, and their actions thereafter, including the attempts to get the Gotham Beef people not to talk, and Grunewald's attempt to get his secretary "to forget" (see the Statement, *supra*, p. 35), can fairly be said to be in furtherance only of the object of concealing the operations of the conspiracy and the identity of the non-taxpayer conspirators.

There was not, however, as petitioners claim, a break between the abandonment of efforts to fix further tax cases and the later aspects of the conspiracy which concentrated on concealment. As we have stated, *supra*, pp. 48–54, the original conspiracy was a continuing one which was *affirmatively* shown in fact to have continued, *in all its aspects*, into the summer of 1950. There is nothing to indicate that it did not continue in all its aspects beyond that time, and the presumption, in the absence of proof to the contrary, is that it did so continue. *Hyde* v. *United States*, 225 U. S. 347, 369; *United States* v. *Kissel*, 218 U. S. 601, 607; *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C. A. 3), certiorari denied, 316 U. S. 678; *United States* v. *Rollnick*, 91 F. 2d 911 (C. A. 2); *Eaker* v. *United States*, 76 F. 2d 267 (C. A. 10); *Telman* v. *United States*, 67 F. 2d 716 (C. A. 10), certiorari denied, 292 U. S. 650; *Coates* v. *United States*, 59 F. 2d 173 (C. A. 9); *United States* v. *Weinberg*, 129 F. Supp. 514 (M. D. Pa.), affirmed, 226 F. 2d 161 (C. A. 3), certiorari denied, 350 U. S. 933. There was a period of comparative quiescence, so far as the

record shows, from the summer of 1950 until the King Committee investigations in 1951, but the record also shows that the conspirators were in touch with each other during that period. Halperin made frequent trips to Washington up to June, 1951. Halperin continued to share an office with Davis, although Schopick had moved out in March, 1951 (R. 355). The manner in which the news of the possible investigations of the Pattullo Modes case was handled justifies an inference that the conspirators had remained in collaboration with each other. Thus, in June, 1951, before the King Committee had called for the Pattullo Modes file, and before the investigator for the Committee had been at Pattullo Modes, Halperin brought word from Washington that there was danger and that action had to be taken. Thereafter, there followed the series of efforts to carry out the purpose, planned from the beginning, to conceal the identity of the conspirators and the results accomplished by the conspiracy. *Supra,* pp. 31–35. The jury was justified in finding that all this was in accord with, and pursuant to, the still-continuing original conspiracy.

The fact that petitioners could not, in the beginning, have foreseen the particular contingency represented by the King Committee investigation is, as the majority below held (Vol. V, App. p. 304), unimportant. So long as the conspiracy was known by them to require active steps of concealment while they were in cooperation with each other and while their "fixed" tax cases were not fully closed, it was not necessary that the conspirators know in advance

the precise events which would call for action to carry out their agreement to conceal. It is enough that the overt acts of concealment were part of the ramifications of the plan which could reasonably be foreseen as a necessary or natural consequence of the unlawful agreement. *Pinkerton* v. *United States,* 328 U. S. 640, 648. See also *Bannon and Mulkey* v. *United States,* 156 U. S. 464, 468; *United States* v. *Manton,* 107 F. 2d 834, 848 (C. A. 2), certiorari denied, 309 U. S. 664; *Allen* v. *United States,* 4 F. 2d 688, 692 (C. A. 7), certiorari denied, *sub nom. Hunter* v. *United States,* 267 U. S. 597. In a mail fraud conspiracy, if use of the mails is a contemplated part of the conspiracy, it is unnecessary that the conspirators know in advance the specific use of the mails which forms the basis of the indictment. *Clarke* v. *United States,* 132 F. 2d 538 (C. A. 9), certiorari denied, 318 U. S. 789; *Spivey* v. *United States,* 109 F. 2d 181, 185 (C. A. 5), certiorari denied, 310 U. S. 631. So here, agreement to conceal any and all aspects of the conspiracy was part of the original plan. The specific form that concealment was to take did not have to be known in advance.

This, then, is the nature of the conspiracy which the evidence established: an initial conspiracy, which from the beginning contemplated three objectives,[14] continued uninterrupted into the period of limitations with the first objective somewhat impaired, the second overlapping the period of limitations, and the third clearly still operative during all the period of limita-

[14] To "fix" tax cases; to protect the results of such "fixing"; and to conceal the nature of the conspiracy and the identity of its participants.

tions. In that factual situation, the jury properly found that the initial conspiracy continued during the period of limitations and that the overt acts (although possibly only in furtherance of two of the three original objectives) were in furtherance of the original conspiracy. As we have pointed out, a conspiracy to conceal the fact that bribes have been given to influence official action would itself be a conspiracy to defraud the United States, distinct from the conspiracy to give or take bribes. Hence, the fact that one of the three criminal objectives of this conspiracy came (of necessity) to an end before the period of limitations does not mean that the whole conspiracy to commit federal crimes had also come to an end. If counterfeiters planned, not only to make counterfeit but to pass it, it would not occur to anyone that the conspiracy had ended after the counterfeit was made but before it was passed. So here, the conspirators planned at least two crimes, to have official action influenced and to conceal official wrongdoing. The fact that one objective had been abandoned does not mean that the conspiracy itself had come to an end.

The recognition of the continuous nature of the conspiracy to conceal revealed by the particular facts of this case will not, as the dissent below suggests, mean that any conspiracy can be indefinitely extended beyond the period of limitations. The duration of a conspiracy does not depend on any magic words in the indictment or notions of the prosecutor; it depends on the facts proved at the trial and found by the jury. If conspirators act together for years in furtherance

of crime, the conspiracy is properly treated as lasting that long. If they do not, the finding that the conspiracy did not continue will flow from these facts, and will be made by the jury or, if necessary, by a trial or appellate court. The judgment of the jury and of the courts below that this conspiracy did last into the period not barred by the statute of limitations is, however, firmly based on the evidence in this case. The bar of the statute of limitations is not being denied to conspirators after years of inactivity and separation, nor is a conspiracy being stretched beyond its real terminal point.

It is important to stress that the question before this Court is not one of law, but of fact—whether the evidence supports the conclusion reached by the jury and the two courts. They believed, as the facts warranted, that the conspirators from the start contemplated active and continuing acts of concealment in relation both to their general activities and to the particular tax cases which had not been fully closed; and that the particular acts of concealment during the period of limitations were part of the original, and still continuing, agreement. Faced with such a finding of fact, the function of this Court—if it wishes to review the evidence at all—is to decide merely whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80. Taking the evidence, as it must be taken, in the light most favorable to the government (*Glasser* v. *United States, supra*), the facts proved, and the infer-

ences reasonably to be drawn therefrom, fully support the jury's verdict.

II

THE TRIAL COURT PROPERLY PERMITTED PETITIONER HALPERIN TO BE QUESTIONED AS TO WHETHER HE HAD CLAIMED HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BEFORE A GRAND JURY WITH RESPECT TO QUESTIONS HE ANSWERED AT THE TRIAL, AND PROPERLY SUBMITTED TO THE JURY THE ISSUE OF HALPERIN'S CREDIBILITY AS A WITNESS ON THE BASIS OF THAT EVIDENCE

Eight of the nineteen questions set forth in the order granting the petitions for writs of certiorari (*supra*, pp. 2–6) are concerned with the government's efforts to impeach the credibility of petitioner Halperin (who alone of all the defendants took the witness stand) by bringing out the fact that, before the Brooklyn grand jury (not the one which returned the indictment), Halperin had claimed his privilege as to matters about which he testified on direct examination at the trial. For example, Halperin was asked if he ever held in escrow money paid by Gotham Beef which he delivered after the decision not to prosecute. He replied that he held the money in escrow but did not deliver it. It was shown that, before the grand jury, when asked whether he had held the money in escrow, he had refused to answer on the ground that the answer might incriminate him (R. 688). Similarly, Halperin denied making a telephone call to Grunewald relative to an appointment for Davis with Bolich. It was shown that, when asked before the grand jury whether he made such a tele-

phone call, Halperin had claimed the privilege against self-incrimination (R. 689–690). The same pattern was followed as to a number of other questions.[15]

At the conclusion of the trial, petitioner Grunewald requested the court to instruct the jury that (R. 774):

> An innocent man may honestly claim that his answers may tend to incriminate him.

The court refused to give this charge to the jury *in haec verba*. It did charge in this regard as follows (R. 748):

> During the cross-examination of one of the defendants, the government questioned the defendant as to his previous statements before the Brooklyn Grand Jury in which he refused to answer certain questions on the ground that answers to them might tend to incriminate him. These questions related to matters similar to those to which the defendant testified at this trial when he took the stand. No witness is required to take the stand or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may

[15] The questions were: whether Halperin had filed a power of attorney in the Clover case (R. 683–684); whether he had ever met Oliphant (R. 686–687); whether he knew Max Steinberg, a group chief in the New York office of the Internal Revenue Service (R. 689); whether he knew Grunewald (R. 690–691); whether he knew Tobias of Gotham Beef (R. 692–693).

use this evidence of a defendant's prior assertions of the Fifth Amendment *for the sole purpose of ascertaining the weight you choose to give to his present testimony* with respect to the same matters upon which he previously invoked his privilege.

The defendant had the right of asserting the Fifth Amendment, when he appeared before the Grand Jury, and I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion. However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege. It is not to be considered in a determination of the guilt or innocence of any co-defendant. [Emphasis added.]

All three petitioners contend (No. 183, Pet. 15–16; No. 184, Pet. 10–17; No. 186, Pet. 17–18) that the trial court erred when it permitted the government to impeach the credibility of petitioner Halperin by thus showing on cross-examination that he had previously, when appearing before the grand jury under subpoena, invoked the Fifth Amendment privilege against self-incrimination in response to similar ques-

tions. The court below considered this same contention and rejected it, saying (Vol. V, App. 310):

> * * * *Raffel* v. *United States*, 271 U. S. 494, resolved the issue thus raised in favor of permitting such questioning and we have nothing to add to what has already been written on the subject by this court in *United States* v. *Gottfried*, 2 Cir., 165 F. 2d 360, 367, and n. 18, and the cases there cited.

Petitioners, relying on the dissenting opinion of Judge Frank in the court below, now urge that the rule of the *Raffel* case not only does not apply in this instance but also that its rationale has been, or should be, rejected by this Court. It is the government's position, on the other hand, that *Raffel* is controlling and that this Court has not, and should not, reject its reasoning.

A. ON THIS ISSUE, RAFFEL V. UNITED STATES, 271 U. S. 494, CONTROLS.

1. In the *Raffel* case, 271 U. S. 494, at a trial before a petit jury on a charge of conspiracy to violate the National Prohibition Act, a prohibition agent had testified that, after the search of a drinking place, Raffel admitted that the place belonged to him. Raffel did not avail himself of his statutory privilege to testify in his own behalf. The jury failed to reach a verdict. Upon the second trial of Raffel, the prohibition agent gave the same testimony as at the first trial. Raffel then took the witness stand and denied making any admission to the prohibition agent. Raffel, after admitting that he had been present at his first trial when the same prosecuting witness had given the same testimony, was asked questions by the

court which required him to disclose that he had not testified at the first trial, and to explain why he had not done so. He was convicted on the second trial. The Court of Appeals for the Sixth Circuit certified to this Court the following question (271 U. S. at 496):

> Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial.

Mr. Justice Stone, writing for the Court, stated that, "The answer to the question certified is 'No'."

In reaching its decision in the *Raffel* case the Court, after noting the conflict among the states on this question, pointed out that the Fifth Amendment, on the one hand, protected a person from being compelled to be a witness against himself, and that the statute (Act of March 16, 1878, c. 37, 20 Stat. 30), on the other hand, afforded a defendant an opportunity to be a witness for himself if he so elected. Recognizing that "the immunity from giving testimony is one which the defendant may waive by offering himself as a witness," the Court then stated at page 497:

> * * * When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. * * * He may be examined for the purpose of impeaching his credibility. * * * His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed. * * * His waiver is not partial; having once cast

> aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing. [Citations omitted.]

After pointing out that the value of such testimony depends upon the nature of the answers elicited, and that their weight is for the jury alone to assess, the Court disposed of Raffel's contention that such cross-examination, if permitted, would constitute compulsion on a defendant to testify at the first trial as "refinements * * * without substance." It concluded:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.

In this unequivocal statement that the immunity from self-incrimination is limited to the "trial" or "tribunal" in which the defendant claims it, the Court makes it clear that it is of no consequence whether the privilege is claimed before a petit or a grand jury. It therefore appears beyond doubt that the principle of the *Raffel* case applies with full force to the present situation.

The attempt to distinguish the *Raffel* situation on the ground that it involved failure to take the stand at a prior trial whereas this case involves a witness

before the grand jury has repeatedly been rejected.[16] *Berra* v. *United States,* 221 F. 2d 590, 597 (C. A. 8), affirmed on other grounds, 351 U. S. 131;[17] *Viereck* v. *United States,* 139 F. 2d 847, 851–852 (C. A. D. C.), certiorari denied, 321 U. S. 794; *United States* v. *Gottfried,* 165 F. 2d 360, 367 (C. A. 2), certiorari denied, 333 U. S. 860; *United States* v. *Klinger,* 136 F. 2d 677, 678 (C. A. 2), certiorari denied, 320 U. S. 746; *United States* v. *Groves,* 122 F. 2d 87, 91 (C. A. 2), certiorari denied, 314 U. S. 670; *United States* v. *Mortimer,* 118 F. 2d 266, 268 (C. A. 2), certiorari denied, 314 U. S. 616; *United States* v. *Buckner,* 108 F. 2d 921, 927–928 (C. A. 2), certiorari denied, 309 U. S. 669; *Tomlinson* v. *United States,* 93 F. 2d 652, 656 (C. A. D. C.), certiorari denied, 303 U. S. 646.

Since the privilege against self-incrimination, as guaranteed by the Fifth Amendment, applies to all persons equally before all official tribunals, it is of

[16] The dissenting judge in the court below asserts that there are valid reasons why a witness might be reluctant to testify before a grand jury which do not apply to a trial itself (Vol. V, App. 324). The pertinence of these asserted differences is that they lessen the apparent contradiction between refusing to testify in one and taking the stand in the other. But to deny the introduction of the evidence on that ground would encroach upon the province of the petit jury whose function it is to pass judgment on the credibility of the explanation. The difference between the proceedings is not so great as to make the refusal to testify so irrelevant that it cannot be considered by the petit jury. Probably, moreover, the balance of the apparent desirability of testifying works in favor of the grand jury, where the witness, whether innocent of guilty, will frequently seize the opportunity to exculpate himself before an indictment is brought.

[17] The issue was raised in the petition for certiorari (No. 766, O. T. 1954), but certiorari was not granted on this point.

no importance where the defendant asserted it. What is of importance is whether or not the defendant, by his own act, subsequently waives the immunity he formerly asserted. Halperin, like Raffel, by voluntarily offering to be a witness in his own defense, must be held to have waived the privilege. The argument that in *Raffel* the defendant had a choice as to whether or not to testify at his first trial, whereas a witness before a grand jury must testify if he does not claim the privilege, misinterprets the reasoning of the *Raffel* decision and involves instead the issue discussed in Point III, *infra,* dealing with the power to call a possible defendant before a grand jury. Halperin before the petit jury gave his version of events, all designed to show innocence. Before the grand jury he said answers to the same questions would tend to incriminate him. While the two positions are not irreconcilably conflicting, they are different. Such a difference was properly brought to the attention of the jury whose duty it was to weigh the credibility of the trial testimony. The decision in *Raffel* turned upon the defendant's choice in testifying at his trial, and not upon his choice in exercising the privilege on a previous occasion. The predicament in which the defendant in the *Raffel* case found himself was no more of his own making than that of a witness before a grand jury; obviously, it was not his choice to be put to trial. And the privilege of a defendant to refrain from taking the stand is of no less dignity than that of a witness to refrain from giving incriminating answers.

The recent stress by this Court on the fact that an innocent person may claim the privilege (*Slochower* v. *Board of Higher Education*, 350 U. S. 551) does not negate the fact that a guilty person may also claim it. If the criterion of admissible evidence is the development of the truth,[18] the pursuit of truth is best served by letting the jury have all the facts. The claim before the grand jury that the answers would tend to incriminate Halperin might or might not be inconsistent with his protestations at the trial of complete innocence. It was certainly, as we have just noted, a different answer. Halperin was entitled to explain that apparent inconsistency, as he did, by developing before the jury the reasons why he felt obliged to claim the privilege (R. 703–708). The jury was then in a position to determine the issue of credibility on the basis of all the facts, not a partial version. To say that a defendant who takes the witness stand in his own behalf is not subject to impeachment by cross-examination, on the grounds that it violates the Fifth Amendment, would convert the privilege against self-incrimination from a shield for the protection of witnesses to a device to protect perjury. Cf. *Walder* v. *United States*, 347 U. S. 62.

The argument that this rule places a person under pressure to testify at the earlier proceeding for fear of the consequences of silence in the event he later chooses to testify was carefully considered in *Raffel* and was rejected with the holding that the "safe-

[18] "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." *Funk* v. *United States*, 290 U. S. 371, 381.

guards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." Any person involved to any degree in a criminal act is under this type of pressure as to anything he does or says that may later be proved to be contrary to the version of events he chooses to place before a jury. So long as evidence is logically relevant, as the prior claim of privilege undoubtedly is, so long as the evidence has not been improperly obtained (a matter we discuss *infra,* pp. 85–97), it ought properly to be before the jury.

Our whole system of criminal justice rests on the assumption that juries are capable of making intelligent judgments on the facts, particularly in relation to issues of credibility. The judgment involved in assessing the weight to be given inconsistent action with respect to the claim of privilege is no more difficult than the appraisal involved in resolving other issues of credibility. It is no more damaging to a defendant to point out prior inconsistent silence, subject to explanation as to the reason for the claim of privilege—it is, in fact, probably less damaging—than it is to bring out, as bearing on credibility, a defendant's prior conviction for a wholly different crime.[19] It is no more difficult—probably less diffi-

[19] It would be inconsistent with the proper view of the privilege against self-incrimination, as this Court has expressed it, to act on the assumption that invocation of the privilege has a derogatory connotation, or implies guilt, or should be considered, in itself, as injurious to the person making the claim. See *Ullmann v. United States*, 350 U. S. 422, 426–429; *Slochower v. Board of Higher Education*, 350 U. S. 551, 557–

cult—for a jury to follow instructions as to the weight to be given the prior inconsistent silence than it is to follow instructions to keep separate the confession of a codefendant. The allocation of law to the court and facts to the jury assumes that a jury is capable of following instructions. *Delli Paoli* v. *United States*, 352 U. S. 232, 242; *Opper* v. *United States*, 348 U. S. 84, 95.

The short of it is that, when a defendant exercises his right to take the stand, he waives his privilege against self-incrimination and assumes the role of a witness with all the attendant benefits and risks that attach to it. *Reagan* v. *United States*, 157 U. S. 301; *Fitzpatrick* v. *United States*, 178 U. S. 304; *Powers* v. *United States*, 223 U. S. 303. He may be cross-examined as to the details of matter within the scope of his direct examination. *Branch* v. *United States*, 171 F. 2d 337 (C. A. D. C.); *Taylor* v. *United States*, 19 F. 2d 813 (C. A. 8). He is subject to the usual rules of impeachment. *Greer* v. *United States*, 240 Fed. 320 (C. A. 8), affirmed, 245 U. S. 559; *United States* v. *Brown*, 40 Fed. 457 (E. D. S. C.). He may be examined regarding a prior conviction for a felony as affecting his credibility. *United States* v. *Empire Packing Co.*, 174 F. 2d 16 (C. A. 7), certiorari denied, 337 U. S. 959; *Weiner* v. *United States*, 20 F. 2d 522 (C. A. 3); *Mercer v. United States*, 14 F. 2d 281 (C. A. 3); *Krashowitz* v. *United States*, 282 Fed. 599 (C. A. 4). To argue, as does petitioner Halperin (Pet. Br. in No. 184,

558. "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it" (350 U. S. at 428–429).

pp. 31–33), that laying a defendant open to complete cross-examination, when he is on the witness stand, deprives him of some of the indicia of a witness accorded him by 18 U. S. C. 3481, is self-contradictory. Only if a defendant, like any other witness, is subjected to complete cross-examination within the permissive limits of the applicable rules, as was petitioner, can he be said to be treated fully and completely as a witness within the intendment of the statute. That is the rationale of *Raffel,* and it is as sound today as it was when issued.

2. Petitioners, relying in large measure on the dissenting opinion of Judge Frank (Vol. V, App. 316–357), urge that *Raffel* has been nullified by the subsequent decisions of this Court in *Johnson* v. *United States,* 318 U. S. 189, and *Slochower* v. *Board of Higher Education,* 350 U. S. 551. But there is a radical difference between the facts in those cases and the situation before the Court in *Raffel* and here.

In *Johnson* v. *United States,* 318 U. S. 189, the defendant was indicted for income tax evasion for the years 1935, 1936, and 1937. He defended on the theory that he had failed to return all his income for those years because of a mistaken but sincere belief that he was required to report only the net balance remaining after deducting political contributions. On direct examination, the defendant admitted receiving $1,200 per week from a numbers syndicate for police protection during the period from July, 1935, through October, 1937, but denied receiving payments in November and December. It was material to the government's case to prove the payments for these last

two months of 1937. Therefore, the prosecution attempted to establish a basis for the inference that the weekly "pay-off" had continued through November and December, 1937, by showing a continuous course of dealing, as to source of funds and amount, which began in 1935 and continued on through 1938. To that end, the accused was asked, on cross-examination, whether he had received payments in 1938, a clearly relevant inquiry, as the trial judge held. The accused then claimed his privilege against self-incrimination, which the judge sustained (despite the *Raffel* rule). Thereafter he allowed the prosecution and the jury to use defendant's silence as evidence of guilt.

This Court held that, regardless of the correctness of the ruling sustaining the privilege, the judge, having once sustained it, ought not to have allowed the refusal to be used as it was. The opinion states (318 U. S. at 197):

> The ruling of the court gave the petitioner the choice between testifying and refusing to testify as to his 1938 income. An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. In this case it would lie between protection against an indictment for 1938 *and the use of his claim of privilege as evidence that he did in fact receive the income during the last two months of 1937.* Elementary fairness requires that an accused should not be misled on that score. If advised by the court that his claim of privilege though granted would be employed

> against him, he well might never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed. * * * [20] [Emphasis added.].

The error which the Court found in the *Johnson* case, therefore, lay in the fact that an unfavorable *inference of guilt* was allowed to be drawn from the assertion of the privilege as to the particular facts as to which the privilege was claimed and sustained. That is not this case. Here, the jury were specifically instructed that no inference was to be drawn from the claim of privilege *per se*. Petitioner Halperin elected to testify and gave wholly innocent, exculpatory, answers to certain questions, staking his credibility, in part, on the answers. The impeachment consisted in the fact that, at a different time, in different circumstances, he gave different answers to those same questions. He was entitled to explain the reason for the difference, but the fact of difference remained for the jury to weigh. Petitioner's prior silence was not being used as affirmative evidence of guilt; it was being used merely as some evidence of possibly inconsistent action bearing on the issue of credibility voluntarily posed by the petitioner.

Similarly, in *Slochower* v. *Board of Higher Education,* 350 U. S. 551, the fundamental error which the Court found lay in fact that the claim of privilege was *per se* permitted to be the basis of an inference of

[20] The final holding in the case was that the accused waived the erroneous comment.

guilt. The issue was the constitutional validity of the section of the Charter of the City of New York which provided that, whenever an employee of the city utilized the privilege against self-incrimination to avoid answering a question relating to his official conduct, his term of employment would terminate, and he would become ineligible for employment. The "summary dismissal" condemned in the holding was emphasized by the Court throughout its opinion as the vitiating factor in the charter provision. Slochower was being deprived of his employment solely because he claimed his privilege, and an implication of guilt was being based on that claim. He was being required to pay a price for claiming the privilege which he had not waived.

The argument that this Court is, in its general approach, withdrawing from the position taken in *Raffel* is largely based on the many recent opinions in which the Court has expressed ungrudging support for the constitutional privilege against self-incrimination and emphasized its importance to our judicial system. Without discussing whether or not this is a "change in approach," it must be noted that the Court has not withdrawn one iota from the view that the privilege can be waived. Cf. *Rogers* v. *United States*, 340 U. S. 367. And the point here, as in *Raffel*, is that the witness did waive the privilege. Such unfavorable inferences as to his credibility as arise result, not from the claim of privilege, but from the fact that Halperin chose at different times to give differing answers to the same question.

3. The dissenting opinion below in effect recognizes that there is as much reason to allow a defendant to be cross-examined as to his prior claim of privilege as there is as to other issues bearing on credibility, for a large part of the dissent discusses the undesirability of permitting a defendant to take the stand. That question of policy, however, is not here. The right of a defendant to be a witness rests upon the statute (Act of March 16, 1878, c. 37, 20 Stat. 30, now 18 U. S. C. 3481) that removed the common law disability of a party of record in a proceeding from being a witness. If that policy is to be changed, Congress must change it. But it may be well to note that the original statute unquestionably represented the general judgment of lawyers and laymen that the policy was a desirable one. There would be little support today for the position that one whose liberty and, perhaps, life is at stake should not be permitted to speak in his own behalf. As this Court said of the judge-made perjury rule in *Weiler* v. *United States*, 323 U. S. 606, 610:

> The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice.

That statement, we think, is applicable both to the statute permitting a defendant to take the stand and to the interpretation of the consequences of taking the stand, as laid down by *Raffel* and the other decisions cited, *supra*, p. 73.

B. THE TRIAL COURT DID NOT ERR IN THE CHARGE TO THE JURY ON THIS ISSUE

As a corollary to the main argument that the prosecution's efforts to impeach the credibility of Halperin were improper, petitioner Halperin contends that the trial court erred when it refused to instruct the jury that "an innocent man may honestly claim that his answers may tend to incriminate." This Court has recognized that this is a correct statement. *Slochower* v. *Board of Higher Education,* 350 U. S. 551, 557; *Ullmann* v. *United States,* 350 U. S. 422. There is, however, no requirement that a trial court must instruct a jury in *haec verba* as requested by counsel. It is not error to refuse to instruct in language submitted by counsel if the charge given correctly states the law applicable to the case. *Sugarman* v. *United States,* 249 U. S. 182, 185; *United States* v. *International Fur Workers Union,* 100 F. 2d 541, 546 (C. A. 2), certiorari denied, 306 U. S. 653.

Though the court refused to charge the jury in the language requested, it did in substance tell them that an innocent man could properly invoke the Fifth Amendment and refuse to answer questions on the ground that the answers might tend to incriminate him. In this regard the court charged (R. 748):

> * * * I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion.

Petitioner's language subtly changes the emphasis. It emphasizes innocence, whereas the claim of privilege is no more than neutral. It ignores the at least *prima facie* inconsistency of his position in testifying at the trial in an effort to clear himself as to facts which he had declared, if revealed, would tend to incriminate him. The charge as given more accurately placed the claim of incrimination in its logical setting. It correctly pointed out that the impeachment potential of the cross-examination of Halperin stemmed not from his prior claim of privilege as such, but in relation to his subsequent act of taking the stand in an apparent effort to exonerate himself.

The whole charge on this issue (R. 748, *supra*, pp. 68–69) correctly stated the law. The court narrowly limited the use the jury could make of the evidence that Halperin had previously refused to answer the same questions. Twice in the course of the instruction the court restricted the jury to considering Halperin's prior assertion of the protection of the Fifth Amendment only for the purpose of ascertaining the weight they would give to his testimony during the trial with respect to the same matters on which he had claimed the privilege. It was made clear that the prior claim bore only on the issue of credibility. And the judge pointed out, clearly and accurately, that no inference could be drawn from the mere fact that the privilege had been asserted. The charge was therefore in full accord with applicable principles.[21]

[21] Assuming a finding of error as to Halperin on this issue, there would arise the question as to whether the error affected

III

THE GRAND JURY INVESTIGATING TAX FRAUDS PROPERLY SUBPOENAED PETITIONER HALPERIN TO FURTHER ITS INVESTIGATION NOTWITHSTANDING THE FACT THAT HE HAD ALREADY BEEN IMPLICATED TO SOME EXTENT IN THE FRAUDS

Petitioner Halperin raises the question (Halperin Br. 3, 35) of whether it "constitute[s] due process to subpoena a person to testify before a Grand Jury in an investigation of which he is the primary target, and thereby permit an examination before trial of a *de facto* defendant?" As thus phrased, the question assumes a fact which the record does not establish—that Halperin was the "primary target" of the grand jury which subpoenaed him as a witness. The record shows that this was not the situation; that at most the Brooklyn grand jury, which returned no indictments, only had reason for suspicion that he might be implicated in the larger general crimes which they were investigating. On this basis neither considerations of policy nor judicial authority require a holding that it was improper to call him before the grand jury.

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the other petitioners. Judge Frank, in his original dissent, considered that the error required reversal as to Halperin alone. In disposing of the argument that if there were error it was harmless, the dissenting judge stated that since there had been an invasion of a constitutional right the error could not be deemed to be harmless. Obviously, this reasoning applies to the use of the evidence against Halperin only, since the constitutional right was personal to him. On that reasoning, the other two petitioners can take no advantage from the error, if error there was.

A. HALPERIN WAS NOT THE PRIME TARGET OF THE BROOKLYN GRAND JURY NOR EVEN A CLEAR POTENTIAL DEFENDANT

1. The record discloses that all counsel for the parties to these cases entered into a stipulation, which was filed with the trial court, wherein they agreed that it was the purpose of the grand jury duly empaneled by the United States District Court for the Eastern District of New York (known in this case as the Brooklyn grand jury) on February 18, 1952, to conduct a general "inquiry and investigation into possible violations of the Internal Revenue Laws of the United States and into possible violations of law in the administration and enforcement of the Internal Revenue Laws and in the administration of the affairs of the Bureau of Internal Revenue and the Internal Revenue Service in the Eastern District of New York" (R. 931). It is highly questionable whether, in any such generalized investigation, there could be said to be any "prime target" at all. But if there were any, then manifestly the prime targets would necessarily have to be the corrupt persons in the Internal Revenue Service. The fact that the Brooklyn grand jury returned no indictments (R. 700) in itself indicates that it had not subpoenaed petitioner Halperin as a prospective defendant or treated him as a *de facto* defendant. Even in jurisdictions which, as discussed *infra*, hold that an indictment must be dismissed if a *de facto* defendant has been called to testify, the single fact that the accused was not indicted by the grand jury which called him, but by a later one, has led the state courts to conclude that the defendant was not the

primary target of the first grand jury proceedings. They have refused to invalidate the indictment in such cases. *People* v. *Elite Distributing Co.*, 76 Misc. 577, 137 N. Y. S. 235; *Commonwealth* v. *Gross*, 172 Pa. Super. 85, 92 A. 2d 251; *Commonwealth* v. *Kilgallen*, 175 Pa. Super. 52, 103 A. 2d 183.[22]

2. Petitioner's contention that he was the primary target of the Brooklyn grand jury's investigation rests on the argument of his counsel that since the testimony of Marks, Mrs. Segel, Greenstein, Tobias, and Berman relative to petitioner was the same before the grand jury as they gave when witnesses for the government during the trial, the grand jury must have subpoenaed petitioner as a prospective defendant (R. 696–698). Assuming that testimony before the grand jury by the taxpayer witnesses (before Halperin was called) was consistent with their testimony at the trial, this does not show that Halperin was then called as a potential defendant. All that the grand jury could know from these witnesses was that Halperin was called in by the taxpayers' attorneys, Schopick and Davis, as co-counsel who could arrange for a decision not to prosecute through a Washington associate. The identity of the Washington associate had, as noted *supra*, pp. 52–53, been carefully concealed from the taxpayers. The person or persons in the Internal Revenue Service through whom this unknown

[22] On October 25, 1954, a grand jury of the Southern District of New York returned the seven count indictment on which petitioners were tried in this case (R. 4). Nothing in the record indicates that petitioner Halperin was either subpoenaed to appear before this grand jury or did appear before it as a witness.

Washington associate may or may not have acted was even less identified to the taxpayers. Under these circumstances, it is a reasonable inference that the grand jury was more interested in tracking down the Washington associate and his connections than they were in making a case against petitioner Halperin.

Nor does the fact that a hypothetical statement—made by Davis to his attorney concerning all the facts and circumstances of the conspiracy—was submitted to the Brooklyn grand jury establish that Halperin was subpoenaed in the role of a *de facto* defendant (R. 388–399, 696–8, 700–2). Even if this statement was considered by the grand jury, it was in hypothetical form and would not have identified the "Washington associate".

Indeed, if the circumstances disclosed by the present record were the end results sought in the investigation, the inquiry would not have been in Brooklyn at all. It can be assumed that the Brooklyn prosecutor knew, what the defendants themselves recognized in their conferences before they were called (R. 360–361), that they could not be indicted in Brooklyn because no overt act was committed in the Eastern District of New York.

At most, the Brooklyn grand jury had reason to believe that Halperin was involved in the larger question of fraud that they were investigating. They could not have been certain even of that. All the taxpayers who testified were, by their own testimony, persons whose regard for truth and honesty was not unlimited. The possibility existed that they were imputing to their attorney actions which he had not

taken. In his own testimony Halperin stated that the Brooklyn grand jury was trying to get the books and records of Schopick and Davis "in order to examine the clients to make a case against *them*" (R. 682). [Emphasis added.]

In the light of this record, the argument of petitioner that "He should not have been called before the Grand Jury at all, since by doing so, the Government was seeking an unsanctioned examination before trial" (Halperin Br. 35) is an unwarranted conclusion. Petitioner appeared before the Brooklyn grand jury as a witness and not as a defendant. As a witness he answered many questions put to him, but also invoked his privilege of silence under the Fifth Amendment (R. 684, 686, 688–690, 693). His claim of privilege against self-incrimination in response to certain questions demonstrates that he was fully aware of his rights and alert to protect them.

The federal decision which seems most favorable to petitioner's cause, when applied to these facts, supports the view that he was not a primary target and that his basic premise is untenable. In *United States* v. *Scully*, 225 F. 2d 113 (C. A. 2), the evidence disclosed that the defendant, as the purchasing agent for two companies constructing air bases under a government contract entitling them to costs plus a fixed fee, so manipulated the placing of purchasing orders as to defraud the government. At the time when he was called as a witness before the grand jury, that body had already learned that the defendant had deposited $4,000 more than he had earned in his bank deposit, and had heard testimony that he had evaded competi-

tive bidding procedures on at least twenty occasions. Yet, the Court of Appeals felt free to say at p. 114:

> * * * it is far from clear on this record that appellant was marked for prosecution, or that the prosecution was aimed at him, or that he was, at the time he testified, in any sense accused of the crime subsequently charged against him.

In other words, Scully was not yet a "*de facto* defendant" when he was called, although he plainly was implicated. There the grand jury knew that Scully had an outside source of income, and had been told, inferentially, that it resulted from his habit of rigging contracts. Here, the grand jury had heard testimony that some taxpayers had tried to "fix" tax cases, and that Halperin was their contact. But the grand jury did not know, when Halperin was called, if Halperin had Washington or official contacts, or who they were, if they existed. Furthermore, they did not know whether Halperin had "fixed" the taxpayers' cases, even assuming he was in a position to do so. If Scully was not yet "aimed at" or "accused," then Halperin has far less cause to claim that status. If Scully was not "marked for prosecution," then Halperin was not a target in any sense. Accordingly, petitioner's premise that he was the target of the investigation must be rejected.

3. The question of whether a "*de facto* defendant" may be called before a grand jury, the situation discussed in the cases on which petitioner relies, is thus not presented here.

On that issue, there is a difference of views expressed in federal decisions although there is no

actual decision dismissing an indictment on such ground. The Second Circuit said in *United States* v. *Scully, supra*, 225 F. 2d 113, 116 (C. A. 2):

> It is at least clear that a prudent prosecutor, to forestall the possibility of error, will in such cases give a warning [of the right not to incriminate oneself]. Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused.[23]

In *Powell* v. *United States*, 226 F. 2d 269, 274 (C. A. D. C.), where the prosecutor had been specifically directed to present to the grand jury "evidence of the activities of Clyde L. Powell," and there was other evidence which established "clearly and convincingly" that Powell was the person against whom an indictment was being sought by this grand jury investigation, the Court of Appeals observed in a decision resting on other grounds that "Under these circumstances there is a serious question whether Powell was subject to subpoena as a witness for the Government". See also *United States* v. *Edgerton*, 80 Fed. 374 (D. Mont.).

There is, however, much language to the contrary. See *O'Connell* v. *United States*, 40 F. 2d 201, 205

[23] The petitioner refers to *United States* v. *Minker*, 350 U. S. 179, as supporting his position. However, that case holds only that Section 235 (a) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1225 (a), does not empower an immigration officer to call as a witness one who is the subject of a denaturalization proceeding under Section 340 (a) of the Act. Because all of the opinions in *Minker* are careful to point out that the case involved the use of a subpoena in an administrative, rather than a judicial, proceeding, its rationale does not apply here.

(C. A. 2), certiorari granted, 281 U. S. 716, certiorari dismissed, 296 U. S. 667, saying that the Fifth Amendment is "an option of refusal and not a prohibition of inquiry"; *United States* v. *Kimball*, 117 Fed. 156, 161 (S. D. N. Y.), saying that "* * * summoning a person, a defendant, before a [grand] jury, and asking him to answer, is not per se a violation of the constitution, * * *"; *United States* v. *Price*, 163 Fed. 904, 906 (S. D. N. Y.); *United States* v. *Benjamin*, 120 F. 2d 521 (C. A. 2); *United States* v. *Manno*, 118 F. Supp. 511, 517 (N. D. Ill.).

Similarly, there is diversity of opinion in state courts as to whether or not a *de facto* defendant may be called before a grand jury and sworn as a witness. In some states, courts say that the indictment should be invalidated if the court concludes that the indicting grand jury which subpoenaed the defendant was actually conducting an investigation directed against him. In this grouping may be found Illinois,[24] Minnesota,[25] Missouri,[26] North Carolina,[27] New York,[28] and perhaps

[24] *People* v. *Cochran*, 313 Ill. 508, 145 N. E. 207.

[25] *State* v. *Fraiseth*, 16 Minn. 296; *State* v. *Gardiner*, 88 Minn. 130, 92 N. W. 529; *State* v. *Cotteau*, 198 Minn. 433, 270 N. W. 144.

[26] *State* v. *Faulkner*, 175 Mo. 546, 75 S. W. 116; *State* v. *Naughton*, 221 Mo. 398, 120 S. W. 53; *State* v. *Capertop*, 276 Mo. 314, 207 S. W. 795; *State* v. *Bright*, 263 S. W. 559 (Mo. App.).

[27] *State* v. *Frizell*, 111 N. C. 722, 16 S. E. 409.

[28] *People* v. *Haines*, 1 N. Y. S. 55; *People* v. *Gillette*, 126 App. Div. 665, 111 N. Y. S. 133; *People* v. *Bermel*, 71 Misc. 356, 128 N. Y. S. 524; *People* v. *Rausch*, 140 Misc. 691, 251 N. Y. S. 454; *People* v. *Seaman*, 174 Misc. 792, 21 N. Y. S. 2d 917; *People* v. *Singer*, 18 Abb. N. C. 96, 5 N. Y. Crim. 1.

Pennsylvania.[29] In these cases, however, the defendant not only answered the subpoena but also gave testimony before the grand jury, and it is therefore difficult to determine upon what basis the decisions were pitched.

Other states quite clearly hold that the privilege against self-incrimination does not include a right to refuse to attend and be sworn as a witness before the grand jury, even though the witness is a *de facto* defendant. Here we find California,[30] Connecticut,[31] Maine,[32] and New Mexico.[33] But, as noted above, even on the basis of the federal decisions which tend to support petitioner, and even in the states most strict in protecting a "*de facto* defendant," this petitioner would not be deemed such a *de facto* defendant.

B. A GRAND JURY IS NOT BARRED FROM CALLING A PERSON, WHOM IT BELIEVES TO HAVE RELEVANT INFORMATION MERELY BECAUSE HE APPEARS TO SOME DEGREE TO BE IMPLICATED IN A CRIME UNDER INVESTIGATION

On the present record, the broadest issue with respect to the powers of a grand jury to call witnesses presented is whether a grand jury may call as a witness a person from whom it desires information who it also has reason to believe may be implicated to some degree in the matter under investigation. To hold that a grand jury ought not to call such a person as

[29] *Commonwealth* v. *Gross*, 172 Pa. Super. 85; 92 A. 2d 251; *Commonwealth* v. *Bane*, 39 Pa. D. & C. 664; cf. *Commonwealth* v. *Klein*, 40 Pa. Super. 352.

[30] *Re Lemon*, 15 Cal. App. 2d 82, 59 P. 2d 213; *Re Hoertkorn*, 15 Cal. App. 2d 93, 59 P. 2d 218.

[31] *State* v. *Kemp*, 126 Conn. 60, 9 A. 2d 63.

[32] *Gendron* v. *Burnham*, 146 Me. 387, 82 A. 2d 773.

[33] *Territory* v. *Torres*, 16 N. M. 615, 121 Pac. 27.

a witness would severely limit the traditional function of grand juries in the federal courts and would be a disservice both to law enforcement and the rights of individuals suspected of crime.

1. It is not our purpose here to attempt to trace the history of the development of the grand jury as an institution of the common law. Nothing of importance could be added to what has been said elsewhere. *United States* v. *Smyth*, 104 F. Supp. 283, 288–290 (N. D. Cal.); Orfield, *Criminal Procedure from Arrest to Appeal* (1947), pp. 135–193; Edwards, *The Grand Jury* (1906), pp. 1–44. It is enough to say that the grand jury "is invested with broad investigatorial powers into what may be found to be offenses against federal criminal law." *United States* v. *Johnson*, 319 U. S. 503, 510. Armed with this inquisitorial authority, it is entitled to pursue matters called to its attention by the court which brought it into being, or submitted to it by the district attorney, or which came to the jurors' attention during the course of, and which are germane to, a situation under investigation or which constitute knowledge within the possession of one or more of the grand jurors. *Hale* v. *Henkel*, 201 U. S. 43. The essential nature of a grand jury proceeding was aptly described in *Blair* v. *United States*, 250 U. S. 273, 282, where it was said:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been

> said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States,* 223 U. S. 178, 184.

Certain conclusions naturally flow from the essential character of a grand jury. Its purpose is to inform itself and then accuse; it is not a trial body. It inquires and investigates, but it does not determine guilt or innocence. To that end, a grand jury is entitled to inquire upon what foundation a charge is made, not upon what ground it is denied. *Respublica* v. *Shaffer,* 1 Dall. 236. Its only function is to determine whether there is sufficient evidence to justify a trial. Orfield, *supra,* p. 144. True enough, many a case is turned over by the district attorney to the grand jury in such condition that there is no doubt as to the nature of the offense, the identity of the offender, and the probable sufficiency of the evidence, if unrebutted. But there are many other occasions—of which this grand jury proceeding is an example—where the scope of the inquiry is broad, where there are numerous possible future defendants, where there is only suspicion, however grave, as to the nature of the offense, and where even less is known as to the identity of the offenders. If a grand jury is to dig out the incriminatory facts in such a situation, it must concern itself with a number of individuals, and not be restricted to the conduct of any particular person. It is in precisely these circumstances that the full scope of the inquisitorial power must be utilized.

2. Investigation must always precede the stage where specific accusation is desirable and the power of investigation must be free from any restraint such as, or similar to, a showing of probable cause. Dession and Cohen, *The Inquisitional Functions of Grand Juries,* 41 Yale L. J. 687, 691. In federal criminal law, the grand jury has such power. *United States* v. *Johnson, supra,* 319 U. S. 503, 510. It is desirable that it should, particularly for cases such as this where the conduct of federal officials is involved. The grand jury system with its secret proceedings embodies many safeguards, not present to so great a degree in other forms of investigation.

First, a record is kept of grand jury proceedings so that possible abuse of the investigative function is subject to scrutiny. Second, the power is vested in a group, rather than an individual, which serves as a rein on arbitrary action. Third, the grand jury can compel witnesses to appear before it only by acting through the court which impaneled it, and, therefore, it is not entirely free to roam where it will. Fourth, grand juries have in the past, demonstrated a willingness to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will. *Hale* v. *Henkel,* 201 U. S. 43, 59; *Hoffman* v. *United States,* 341 U. S. 479, 485.

Since prosecutions must begin with an investigation, and since grand juries are the proper instrument to conduct investigations, good sense demands that the jury not be unduly hampered in the exercise of its functions. Its range must be wide, and its progress

must not be impeded unnecessarily. Narrowed to the terms of this issue, Halperin should be viewed as just another witness and hence subject to subpoena as such. The grand jury may suspect that a particular person will turn out to be a party to a conspiracy, or a principal offender in a crime under investigation; but he should be considered as a witness subject to process at least until the grand jury is reasonably certain that it will indict. Any other approach will impede the grand jury function. Any other ruling will lead to less and less use of the grand jury as an instrument of investigation and more use of private interrogation without all the safeguards discussed above.

For these reasons the government submits that it is in the interest, both of law enforcement and of individual suspects, to hold that a person in Halperin's position may properly be called as a witness before a grand jury, always of course with his right to claim the privilege against self-incrimination.

IV

PETITIONER HALPERIN, WHO SOUGHT OUT WITNESSES WHO DID NOT WISH TO CONSULT HIM AS AN ATTORNEY AND ADVISED THEM TO REMAIN SILENT WHEN THEY WISHED TO TELL THE TRUTH, WAS PROPERLY CONVICTED OF ENDEAVORING TO OBSTRUCT THE ADMINISTRATION OF JUSTICE

Petitioner Halperin,[34] by his question "whether a person may be convicted of corruptly influencing wit-

[34] Though each of counts 5, 6 and 7 named Grunewald, Bolich, Steinberg, Scherm, Halperin, Hoffman, Davis and Schopick as defendants, only petitioner Halperin has been convicted of them. Defendants Hoffman, Davis and Schopick were severed

nesses solely on proof that he advised a witness to plead the Fifth Amendment where the witness was justified in doing so, even though the plea would also serve the interests of the person giving the advice" (Halperin Pet. 24), attempts to interject into the case a spurious issue that has no foundation in fact. A brief review of the record will disclose that this issue is not properly before the Court at this time.

The indictment in counts 5, 6, and 7 (R. 14–16) charged violations of 18 U. S. C. 1503 and 18 U. S. C. 2. Count 5 charged that defendants

> * * * well knowing that a grand jury * * *, hereinafter referred to as the Brooklyn Grand Jury, was duly conducting an inquiry and investigation, and well knowing that Morton Marks had been subpoenaed by, and was about to be a witness before, said Brooklyn Grand Jury * * * did unlawfully, wilfully, knowingly and corruptly endeavor to influence, intimidate and impede said witness, and * * * to influence, obstruct and impede the due administration of justice * * * by counseling, requesting, advising and suggesting to said witness that he give fictitious, fradulent, false and manufactured testimony before said Brooklyn Grand Jury * * * and that he refuse to answer pertinent questions and refuse to tell the whole truth to said Brooklyn Grand Jury * * *.

Counts 6 and 7 were similarly worded, differing only in respect to the identity of the witness influenced (Berman and Tobias) and the date of the violation.

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from the trial of Halperin on these counts. The trial court dismissed these counts as to Grunewald, Bolich, Steinberg, and Scherm during the trial at the end of the government's case (R. 569).

The court charged the jury as follows (R. 745–746):

> If you can conclude, beyond a reasonable doubt, that Halperin, knowing that a proceeding was pending before the Grand Jury and that the person with whom he was communicating was a potential witness before the Grand Jury, urged him not to tell the truth before the Grand Jury, with a deliberate intent to impede the judicial proceedings, then you may convict the defendant Halperin on those counts. If, however, you cannot so conclude, or if you conclude that the only advice given by Halperin to these persons was to retain a lawyer, or to invoke their constitutional privilege of refusing to answer questions on the ground that the answers might tend to incriminate them, then you should acquit the defendant Halperin on Counts Six and Seven.

In view of this instruction, it is clear that the issue is not whether the verdict could rest on petitioner's advice to the witness as a lawyer to refuse to answer questions on the ground that the Fifth Amendment protected him. The verdict rested on a finding that petitioner intended to impede justice by influencing a witness not to tell the truth.

The evidence as to all three substantive counts, any one of which supports the concurrent sentences imposed, shows clearly that this petitioner Halperin was not convicted for advice he gave as a lawyer.

1. As to counts 6 and 7,[35] the evidence shows that early in 1952 Davis and Halperin went to see Tobias

[35] These counts charged corrupt endeavors to influence witnesses Tobias and Berman on March 13 and March 18, 1952 (R. 15–16).

at his office and told him that the newspaper accounts of the Pattullo case were a lot of fanfare and "that they had not spoken about the Gotham case and they were sure if everybody was silent that the whole thing would blow over in a short time" (R. 170).

In February, 1952, Halperin and Davis again met with Tobias at which time Davis said that if "anybody were to come to speak to Berman or myself [Tobias] to refer them to Davis as Berman's attorney" (R. 171). As to Halperin's part in this meeting, Tobias testified (R. 171):

> Halperin said that he had done Berman a very good turn in the handling of his own tax case and he certainly wanted to ask Berman not to hurt him by talking in connection with the tax case now.

About March 15, 1952 (the date charged in count 6), Halperin went to lunch with Berman and Tobias (R. 149). Berman testified that Halperin, after expressing the fear that he would be indicted, said he was going to stand on his constitutional rights and hoped that Berman would do the same (R. 149–150). Berman testified further (R. 150):

> He [Halperin] mentioned the fact that he had done me a good turn and that was the least I could do for him.

Halperin then advised Berman to engage an attorney (R. 150). Berman, on receiving a subpoena from the grand jury, engaged Mr. Kotler as counsel (R. 149, 162).

On March 18, 1952 (the date charged in count 7), Davis again met with Tobias and, after explaining

that the Pattullo Modes people had talked to the grand jury about the role Davis and Halperin had played in obtaining the decision not to prosecute them, said that he was afraid that the Gotham Beef case would come up for examination. Tobias testified that Davis then "asked Berman and myself to please not say anything" (R. 171). A day or so later Tobias met with Halperin and was again told that the Pattullo Modes people had testified. According to Tobias' testimony, Halperin said (R. 172):

> * * * that it was a terrible thing for them to have done, that he hopes that Berman wouldn't do the same thing to him because he had done Berman such a good turn; it would be a terrible thing. He said he had been in touch with the Washington associate and that he was going to stand silent, Halperin was going to stand silent and he hoped that Berman and I would likewise do the same thing.

At no time during the conversation between Tobias and Halperin did Halperin suggest that Tobias invoke the Fifth Amendment before the grand jury (R. 180–182).[36]

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[36] Petitioner's counsel, during cross-examination of Tobias, in an apparent effort to establish that petitioner had merely urged Tobias to remain silent lest he give evidence that might tend to incriminate himself, was able to elicit only that petitioner, while not asking Tobias to lie, merely suggested this ground for silence. Tobias testified, "There were requests by Mr. Halperin that Berman and I do not talk, that it would be a bad thing for him and it would be a bad thing for Berman. He did not use any legal phraseology such as 'Stand on the Fifth Amendment or refuse to answer on constitutional grounds,' or anything like that. But he did say that he hoped that Berman and I would not discuss this case with authorities" (R. 181–182).

2. As to count 5, the evidence showed that Davis, on hearing that a grand jury had been empanelled in Brooklyn in February, 1952, met with Halperin, Schopick and Hoffman at which time they felt that the "clients" would claim their constitutional privilege and not give evidence if called before the grand jury as witnesses (R. 361). When a subpoena duces tecum was served on the Pattullo Modes Corporation to produce its books and records before the grand jury, Morton Marks, the secretary of the corporation and a stockholder therein (R. 17–18), notified Mr. Kostelanetz and Mr. Nahum Bernstein who were their "only lawyers at that time" (R. 44).[37] Marks testified that Davis "was eager to learn about any thing that Mr. Bernstein or Mr. Kostelanetz were going to advise us about" (R. 44). Ten days or two weeks after the service of the subpoena duces tecum on Pattullo Modes, Marks was subpoened to appear before the grand jury (R. 44). Davis, learning that Marks and Mrs. Segel were to meet with Mr. Kostelanetz on a Sunday in early March, 1952, called the latter to see if he should attend (R. 362). When Davis learned he was not wanted at the meeting, he immediately contacted Halperin, Hoffman and Schopick and told them that he "felt that they were going their own way, their separate ways" (R. 362). Halperin, Hoffman and Schopick told Davis that he

[37] Mrs. Marjorie Segel, a stockholder in Pattullo Modes, testified (R. 114):

"* * * we had retained Mr. Kostelanetz, so that we weren't taking advice from Mr. Davis at this point. We just used to talk to him to really try and find out what he thought was going on."

"should nevertheless try to communicate with Mr. Marks" (R. 362). Davis then testified (R. 362):

> * * * the following day, on a Monday, I believe, I called Mr. Marks and wasn't able to speak to him immediately, but I finally did get him, and he consented to see me, and Mr. Schopick and I went over to the office of Patullo Modes and there we saw Mr. Marks, and said, "How did it happen that you had this meeting without me?"
>
> He says, "We have decided to cooperate with the Government."

Davis fixed the date of this meeting with Marks as approximately March 8 or 9, 1952 (R. 363).

Marks, testifying for the government, described the meeting as follows (R. 45):

> * * * I avoided him for several days, wouldn't take any telephone calls. He finally came up to see me at our office. I saw him alone—him and Mr. Shopick alone. He said, "Morton, what are you going to do? Why are you avoiding me? Are you going to talk?"
>
> I said, "I am going to do what my counsel advises us."
>
> He said, "Well, you can't talk. You would be crazy to talk. If Mr. Kostelanetz told you to do that he is crazy. I will get you any lawyer you want, put it up to him; put it up to this lawyer and if he tells you to do anything that Mr. Kostelanetz does, you can do it, but please take my offer to see another lawyer. Mr. Kostelanetz is crazy to do a thing like that, to advise you to do that."
>
> I told him I wasn't going to see anybody else, that we were going to take Mr. Kostelanetz's advice.

He said, "Morton, are you going to turn me in?"

My answer was that I was going to take the advice of our attorney, and he and Mr. Schopick left.

On this record, the court below was correct in stating (Vol. V, App. p. 315) "it is nothing short of fantastic to suggest that this is no more than legitimate advice by a lawyer to a client, for the client's own protection". The witnesses did not come to Halperin (or, as to count 5, to Davis acting in agreement with Halperin) for advice. The lawyers sought them out, and not for the purpose of advising clients in the client's interest. The lawyers sought them out for the express purpose of influencing the course of action which their former clients would take as witnesses before the grand jury. The intent was, regardless of the interest of the witnesses, to obstruct the administration of justice.

Petitioner pins his argument on the statement in the opinion below that "It is immaterial that Halperin did not ask these witnesses to tell deliberate falsehoods." The whole tenor of the conversations "* * * was that of impeding justice and maintaining secrecy with respect to the operations of the conspirators" (Halperin Br. 40–45). In other words, the argument is that, although he deliberately and intentionally tried to keep the witnesses from telling the whole truth to the grand jury, when the witnesses wished to tell the truth, Halperin is nevertheless not guilty of impeding justice because the means of obstruction which he suggested had the appearance of legitimacy. The use of a legitimate facade does

not protect acts deliberately designed to bring about an unlawful result.

This Court has recognized that this statute, which protects the foundations of our judicial system, must be given a broad construction. In *United States* v. *Russell*, 255 U. S. 138, an experimental approach to a juror through his wife to discover whether the juror would be receptive was held to be an "endeavor" within the meaning of a prior and substantially identical statute. See also *Sinclair* v. *United States*, 279 U. S. 749, 764, holding that the shadowing of jurors, although unknown to them, was a contempt because it "tended to obstruct the honest and fair administration of justice." In *United States* v. *Polakoff*, 121 F. 2d 333, 334 (C. A. 2), certiorari denied, 314 U. S. 626, the court held that there was a corrupt endeavor to obstruct justice where a person, for supposedly disinterested reasons, but actually in expectation of financial gain, tried to persuade a United States Attorney to recommend a light sentence. The holding rejected the argument (p. 333) that a corrupt endeavor to influence a court official requires an attempted debauching of that official, and not merely a use of otherwise legitimate arguments for concealed or falsified ends.[38]

[38] The Second Circuit in the *Polakoff* decision limited its prior ruling in *Rosner* v. *United States*, 10 F. 2d 675, cited by petitioner (Halperin Br. 44), to the special fact that there the advice by the defendant to a witness was to disregard a letter. It noted that "since a mere request by the prosecutor that an accused appear could be disregarded as not compulsory process, advice to that end was not illegal." (121 F. 2d at p. 335, see also *United States* v. *Polakoff*, 112 F. 2d 888 (C. A. 2), certiorari denied, 311 U. S. 653).

The motive of a witness exercising his legitimate claim of privilege may be immaterial, as petitioner argues. But the motive of one who tries to keep a witness from testifying when the witness, upon the advice of counsel, has decided to tell the truth is manifestly material in relation to obstruction of justice. The intent with which an act is done in many situations makes the difference between criminality and lack of criminality. *Morissette* v. *United States*, 342 U. S. 246; *Screws* v. *United States*, 325 U. S. 91, 104–105. Thus, the use of a legal contract with intent to defraud is a crime under the mail fraud statute, although use of the same contract with honest intent may be lawful. *Miller* v. *United States*, 133 Fed. 337, 342 (C. A. 8). Perjury may be established by showing that the witness did not believe that the statement which he made under oath was true. *United States* v. *Remington*, 191 F. 2d 246, 248 (C. A. 2), certiorari denied, 343 U. S. 907; *Regina* v. *Schlesinger*, 10 Q. B. 670, 2 Cox. Cr. Cases 200 (1847); *People* v. *McKinney*, 3 Park. Crim. Rep. (N. Y.) 510, 515 (1857).

Under this statute, where the attempt to obstruct justice, the "endeavor", is itself the crime, the intent with which the approach to the witness was made is manifestly controlling. Halperin intended to keep the witnesses from telling the truth before the grand jury; he intended to impede the process of the grand jury. He was therefore properly convicted of an attempt to obstruct the administration of justice.[39]

[39] For the reasons developed above, we believe that the case of *United States* v. *Herron*, 28 F. 2d 122 (N. D. Cal.), relied upon by petitioner (Halperin Br. 42), was wrongly decided. It is in any event distinguishable. There, some defendants on

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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trial advised a witness to consult a lawyer and plead the Fifth Amendment, and the defendant's lawyer advised the witness to do so. Since the indictment charged that the lawyer gave the advice, not in the interests of his client, but with intent to benefit the others, we think it charged an offense. But since the lawyer gave the advice to one consulting him as such, it is very different from this case where the witnesses did not wish to consult, indeed sought to avoid petitioner, and petitioner or his co-conspirator sought them out.

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